Supreme Court, U.S.
FILED
05-261 AUG 24 2005
OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

JACADA (EUROPE), LTD., f/k/a
CLIENT/SERVER TECHNOLOGY (EUROPE), LTD.,
Petitioner,

v.

INTERNATIONAL MARKETING STRATEGIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly expanded federal subject matter jurisdiction by going beyond the clear language of Section 202 of the Federal Arbitration Act, 9 U.S.C. § 202, and instead ruling that the court could "craft" a "general definition" from that statute as to whether an arbitration award is "domestic" and thus vests the court with jurisdiction.

2. Whether the Court of Appeals' ruling as to the broad preemptive reach of the Federal Arbitration Act, such that the parties' agreed-to choice of state law is automatically ignored as to the standard of review of the arbitration award, conflicts with this Court's prior rulings and exemplifies confusion among parties, academics and the courts on a recurring issue.

3. Whether the Court of Appeals' affirmance of an arbitration award which disregarded the parties' contractual limitation of liability provision in express and manifest disregard of the law abandons this Court's established standards for judicial oversight of arbitral rulings.

PARTIES TO THE PROCEEDING and RULE 29.6 STATEMENT

Petitioner Jacada (Europe), Ltd. f/k/a Client/Server Technology (Europe), Ltd. ("CST") is wholly owned by Jacada Ltd., an Israeli corporation. Respondent is International Marketing Strategies, Inc., a Michigan corporation.

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INTRODUCTORY PRAYER FOR RELIEF

Petitioner Jacada (Europe), Ltd. f/k/a Client/Server Technology (Europe), Ltd. ("CST") respectfully prays that the Court grant a writ of certiorari to review the order of the Sixth Circuit Court of Appeals, dated March 18, 2005, published at 401 F.3d 701 (6th Cir. 2005).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 401 F.3d 701 (6th Cir. 2005). (App. at 3a.) Petition for rehearing was denied without opinion in an unpublished order dated May 27, 2005. (App. at 1a.)

The two pertinent decisions of the United States District Court for the Western District of Michigan are (1) published at 255 F.Supp.2d 744 (W.D. Mich. 2003) and (2) an unreported Order and Opinion dated Oct. 22, 2003 (App. 35a, 49a). The underlying arbitration award is dated April 3, 2001 (App. at 66a).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on March 18, 2005 and its order denying rehearing on May 27, 2005. (App. at 3a, 1a.) This Petition is filed on August 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND TREATIES

Article I of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("Convention") provides:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other that the State where the recognition and

> enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

The entire Convention is reproduced in the Appendix (at 75a).

Section 202 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 202, is part of the implementing legislation for the Convention. It provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Other relevant provisions of Chapter 2 of the FAA are reproduced in the Appendix (at 85a).

STATEMENT OF THE CASE

Petitioner Jacada (Europe), Ltd. f/k/a Client/Server Technology (Europe), Ltd. ("CST")[1] seeks the review of a decision of the United States Court of Appeals for the Sixth Circuit which upheld two rulings of the United States District Court for the Western District of Michigan.

A. Background of the Litigation

CST creates and sells computer software and related support services. In 1997, it entered into a Distribution Agreement with International Marketing Strategies, Inc. ("IMS"). (App. at 89a). The Agreement granted IMS exclusive authority to sell certain of CST's products in certain markets, and non-exclusive authority as to other products. In 1998, CST entered into a contract with a customer, JBA, under which JBA purchased certain software from CST, as well as CST's continued support of the software. IMS initiated an arbitration claiming that CST's sale of software to JBA violated its exclusivity rights under the Distribution Agreement. CST counterclaimed for amounts owing from IMS.

In the Distribution Agreement, the parties agreed to arbitrate any dispute in Michigan (IMS is a Michigan corporation) under the Commercial Arbitration Rules of the American Arbitration Association. (App. at 104a) The Distribution Agreement further provides: "This Agreement will be governed by the laws of the State of Michigan." *(Id.)* The parties thus conducted the arbitration in Michigan under Michigan law.

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[1] The party named in the operative contract at issue is Client Server Technology (Europe), Ltd. That entity later changed its name to Jacada (Europe), Ltd. The arbitration award references Petitioner as "CST", which is used herein for continuity.

At the arbitration hearing, CST denied any breach of the agreement, but also relied upon a partial limitation of liability provision in the event a breach was found. The parties and the arbitrators agreed that CST's maximum liability under that provision was $125,937.91. (App. at 70a).

The arbitration panel found CST liable for breach of the Distribution Agreement and awarded IMS approximately $3 million in damages (assuming certain future payments were made by JBA to CST). As to the limitation of liability provision, it was disregarded as "unreasonable":

> The Agreement contains a limitation of damages clause which would reduce the maximum amount of any damages claimed by IMS "to the amounts actually paid by IMS to CST under this Agreement." Agreement at paragraph 10(b). Evidence introduced at the hearing established this amount to be approximately $125,937.91 USD. The potential effect of the limitation of damages clause is to unreasonably and unconscionably exclude damages for a large breach of the Agreement while permitting damages for a small breach of contract. For example, if IMS had made only sales of e.g., $1,000 to customers and then landed a large sale of e.g., $200,000 to a new customer, CST would be able to limit its damages under a breach of contract claim for the $200,000 sale to 50% of $1,000 sales previously made by IMS. The arbitrators find this limitation of damages clause in the Agreement to be unreasonable and unconscionable and find that it fails of its essential purpose. Consequently, the limitation of damages clause will be disregarded.

(App. at 70a-71a). The arbitration award concludes with this statement: "We hereby certify that for the purposes of Article

1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Southfield, Michigan, USA." (App. at 73a)

B. Procedural Background

On April 21, 2001, CST timely filed an action in Michigan state court, seeking vacatur of the arbitration award. Later that same day, IMS filed an action in the United States District Court for the Western District of Michigan seeking confirmation of the award. Federal subject matter jurisdiction was predicated solely on the claim that the arbitration award was purportedly "non-domestic" and thus fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("Convention"), pursuant to 9 U.S.C. § 203.

Upon CST's motion, the second-in-time federal court action was stayed in deference to the first-filed state court action. Subsequently, the state court action was removed to the United States District Court for the Western District of Michigan and consolidated with the other pending federal action. The notice of removal cited only the Convention as a basis of federal court subject matter jurisdiction and removal (9 U.S.C. § 205).

C. The Rulings of the District Court Now at Issue

The district court issued an Order dated March 31, 2003 regarding subject matter jurisdiction and the standard of review it would apply to CST's appeal of the arbitration award. (App. at 35a). That order was not a final, immediately appealable order. That opinion made two pertinent rulings. First, the district court held that it was "constrained" to follow a Second Circuit opinion and find that it had subject matter jurisdiction because the arbitration award

was "non-domestic" and thus fell under the Convention. Second, the district court ruled that the Federal Arbitration Act ("FAA"), rather than the Michigan, standard of review of the arbitration award would apply, notwithstanding a choice of law provision in the parties' underlying contract.

Subsequently, the district court heard arguments on CST's motion to vacate the arbitration award. CST did not appeal the finding of a breach of contract, but argued that the arbitrators acted in manifest disregard of the law and imposed their own version of "industrial justice" in expressly disregarding the limitation of liability provision in the parties' contract. In an Order dated October 22, 2003, the district court denied CST's Motion to Vacate the arbitration award and granted IMS' Motion to Confirm the award. (App. at 49a).

D. The Circuit Court Opinion

CST timely filed its Notice of Appeal on November 17, 2003. In a split decision which addressed "complicated" and "novel" issues of law, the Circuit Court affirmed the District Court's rulings in an Opinion dated March 18, 2005. (App. at 3a).

On the issue of subject matter jurisdiction, the Circuit Court agreed with CST that 9 U.S.C. § 202 did not expressly address the issue and the Court did not disagree (nor had IMS) with CST's recitation of the common law definition of domesticity which would have rendered the award "domestic." Notwithstanding, the Court held that it could "craft a general standard" out of 9 U.S.C. § 202 to define whether an award was "domestic" or not and thus whether it fell under the Convention. Having "craft[ed]" this standard broadly, the Circuit Court held that it had subject matter jurisdiction.

As to the standard of review, the Circuit Court held that any standard of review which might be more "liberal" than the FAA standard of review is preempted by the FAA because the standard of review implicates "federal policy favoring protection of arbitrator authority."

Finally, the majority of the Circuit Court panel held that the arbitration award was not in manifest disregard of the law. On this issue, the Honorable Eric Clay dissented, stating that "this is the rare case where the award amounts to the arbitrators' 'own notions of industrial judgment,'" and voted to vacate the award.

CST's Motion for Rehearing was denied by Order dated May 27, 2005 (App. at 1a). This petition for certiorari was timely filed on August 24, 2005.

REASONS FOR GRANTING THE WRIT

A. THE CIRCUIT COURT INAPPROPRIATELY EXPANDED THE SCOPE OF FEDERAL SUBJECT MATTER JURISDICTION BY "CRAFT[ING]" A GENERAL STANDARD FROM 9 U.S.C. § 202 CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE

1. Overview of Reason for Granting the Writ

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction...." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (citations omitted).

Federal court subject matter jurisdiction in this case is predicated solely upon the Convention, pursuant to 9 U.S.C. § 203. Rather than following the text of the Convention and

implementing legislation, established common law, legislative history and scholarly commentary, the lower court instead expanded federal subject matter jurisdiction by conjuring a countertextual general "standard" from 9 U.S.C. § 202.

The issue is whether or not, under Article I(1) of the Convention, the arbitration award is "domestic." If the award is "domestic," the Convention does not apply. Since the Convention was the sole jurisdictional basis of IMS' lawsuit and the removal of CST's lawsuit, if the award is "domestic," then there is no federal subject matter jurisdiction.

The Convention does not itself define whether an award is "domestic." Rather, as the Circuit Court correctly summarized, the drafters of Article I(1) of the Convention left to each nation to define for itself its own concept of "domesticity." (App. at 8a-10a). In the United States, that long-standing concept is that an award is domestic when it is made here and sought to be enforced here. *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 482 (7th Cir. 1997)("An arbitration award made in and sought to be enforced in the United States is a domestic award according to traditional principles of Anglo-American conflicts of law, under which the law of the place of the award determines whether the award is valid.") (*citing* Restatement (Second) of Conflict of Laws § 220, cmt. c (1971)).[2] Some courts have looked no further than this and applied the long-standing common law rule of domesticity to determine whether an award falls under the Convention. *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading Inc.*, 2000 WL 435566 (D.Conn. 2000). The

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[2] The Restatement goes further, stating that if there is some reason to look beyond the state of rendition of the award, the parties' intentions as expressed in a choice of law provision should be considered. *Id.* Here, the parties' choice of law provision clearly specifies Michigan law.

arbitrators in this case also apparently had this understanding, as they included the following language in their award: "We hereby certify that for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Southfield, Michigan, USA." (App. at 73a)

Despite this, the Circuit Court held that the second sentence of 9 U.S.C. § 202 can be used to "craft a general standard" as to when an award is domestic. That sentence provides:

> An agreement or award arising out of [a commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

CST pointed out the obvious: this sentence by its terms applies to only one scenario – an agreement or award arising out of a commercial relationship "which is entirely between citizens of the United States." Since IMS and CST are not both citizens of the United States, the sentence is wholly inapplicable and the common law definition of domesticity should be followed. Under that test, the award is domestic, the Convention does not apply, and the court is without subject matter jurisdiction thereunder.

The Circuit Court's ruling combines bald judicial creationism of subject matter jurisdiction with a violation of two canons of statutory construction. Rather than "presuming" that the action lay outside the jurisdiction of the Court, *Kokkonen*, *supra*, the Circuit Court instead held that it could "craft a general standard out of § 202" despite the lack of express terms of that statute which would render it

applicable. (App. at 14a). This judicial "crafting" violates the "preeminent canon of statutory construction," which is to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Bedroc Ltd. v. U.S.*, 541 U.S. 176, 183; 124 S.Ct. 1587; 158 L.Ed.2d 338 (2004)(quotation omitted). The Circuit Court's disregard of the plain statutory language and "craft[ing]" of an all-inclusive definition also overrode what is unchallenged as the long-standing common law definition of "non-domestic" and hence did violence to the "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *Whitfield v. U.S.*, 543 U.S. ___; 125 S.Ct. 687, 691; 160 L.Ed.2d 611 (2005)(*citing Molzof v. U.S.*, 502 U.S. 301, 307-308, 1125 Ct. 711, 116 L.Ed.2d 731 (1992)); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). This principle mandates that it be *presumed* that the statute comports with the common law. *Neder v. U.S.*, 527 U.S. 1, 23; 119 S.Ct. 1827; 144 L.Ed.2d 35 (1999).

2. The Circuit Court's ruling is not justifiable under either the purpose and history of the Convention or the implementing legislation.

The Circuit Court justified its ruling by noting that it is "sensible to read the second sentence of § 202 as dealing with the issue presented by Article I(1)" and the statute was intended to speak to the issue of whether "something is non-domestic." (App. at 12a) Indeed it does – but the *only* "something" it deals with is what it says it deals with – to an agreement or award entirely between two U.S. parties. The statute simply does not address other situations, such as an award between one U.S. party and one foreign party, and thus the long-standing common law test continues to apply.

Contrary to the Circuit Court's ruling, there is nothing "perplexing" about reading the statute as written rather than re-writing it as a general definition. The Circuit Court effectively found that the statute was ambiguous, yet ignored the only available legislative history to this statute. That legislative history confirms that the second sentence of 9 U.S.C. § 202 was deemed necessary to "make it quite clear that arbitration arising out of relationships in interstate commerce remains under the original Arbitration Act and is excluded from the operation of the proposed chapter 2", and that the overarching intent of the drafters of the implementing was "not to make any changes with respect to matters that are traditionally within the jurisdiction of the 50 States of the Union." S. Comm. on Foreign Relations, Foreign Arbitral Awards, S. Rep. No. 91-702 (1970) (App. at 114a, 116a). The second sentence of Article I of the Convention was to apply to foreign awards involving U.S. parties, and that was all that was sought to be clarified under 9 U.S.C. § 202. The goal was to delineate the FAA from the Convention, not modify the Convention itself or the long-standing common law definition of domesticity. Albert Jan van den Berg, *When Is An Arbitral Award Nondomestic Under the New York Convention of 1958?* 6 PACE L.REV. 25 (1985) (App. at 174a-175a) ("In other words, the drafters were concerned about a delineation of the ambit of Chapter One and Chapter Two of the Federal Arbitration Act. The legislative history nowhere suggests that the provision was intended to be a definition of nondomestic awards."). While this logic may not be readily apparent from the face of the statute, there is nothing "perplexing" about it, as alleged by the Circuit Court.

The problem for the drafters was described in the Senate Report:

> ...we were faced with the problem that section 1 of the [federal arbitration] act, which defines commerce,

> specifically includes both interstate and foreign commerce, while the implementation of the Convention should be concerned only with foreign commerce. Consequently it was necessary to modify the definition of commerce to make it quite clear that arbitration arising out of relationships in interstate commerce remains under the original Arbitration Act and is excluded from the operation of the proposed chapter 2.

(App. at 116a).

As the Senate Report goes on, it was clear that what was envisioned was two U.S. parties designating a foreign situs for arbitration, and then seeking to enforce the award in the U.S. Thus, it is noted that the second sentence is drawn from Section 1-105(1) of the Uniform Commercial Code, incorporating the "reasonable relationship" test between the forum selected and the affairs of the parties. That this was the intended, and limited, scope of this language is made more evident by the discussion surrounding 9 U.S.C. § 207, which provides a three year statute of limitations. The Report notes that this was included because "all of the experts on arbitration who worked with us considered that a 1-year period for the enforcement of *foreign* arbitral awards was much too short," given the fact that before enforcement proceedings would take place in the U.S., some foreign appellate process (as envisioned under Article V(1)(e)) would occur. (App. at 119a-120a). The point is that the second sentence of Article I of the Convention was to apply to foreign awards involving U.S. parties, and that was all that was sought to be clarified under 9 U.S.C. § 202. The goal was to delineate the FAA from the Convention, not modify the Convention itself. (van den Berg, *supra*, App. at 175a). ("In other words, the drafters were concerned about a delineation of the ambit of Chapter One and Chapter Two of

the Federal Arbitration Act. The legislative history nowhere suggests that the provision was intended to be a definition of nondomestic awards.").

By noting that two U.S. parties are not *per se* exempt from the Convention, the drafters sought to further the goals of the Convention – clarifying that the federal courts, for example, could under Article II(3) refer the matter to arbitration in (*e.g.*) Geneva; the court had no such power under the FAA. In this regard, the purpose of the second sentence of 9 U.S.C. § 202 is to define "domestic," but only for the limited circumstance of two U.S. parties; there is no statement in 9 U.S.C. § 202 of general definition. By the statute including a definition for a particular circumstance, it is not logical to conclude that all other circumstances are, *a fortiori*, subject to the same definition. This is particularly the case given the legislative history preserving pre-Convention state and federal rights of parties.

3. The Circuit Court Case Which Is the Font of Judicial Confusion on this Issue Was Wrongly Decided

The Circuit Court buttressed its ruling by reliance upon the Second Circuit's decision in *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2nd Cir. 1983), which in turn was followed (without analysis) by an Eleventh Circuit opinion.[3] *Bergesen* is factually anomalous and wrongly decided – as even the authoritative scholar of the Convention, Professor van den Berg, concludes in the article repeatedly cited by the Circuit Court. (App. at 170a-171a, 176a, 181a) Moreover, no amount of past judicial treatment justifies statutory construction at odds with the statute's clear terms. *Lexecon*

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[3] *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998)("If we do our job of reading the statute whole, we have to give effect to this plain command, ... even if doing that will reverse the longstanding practice under the statute and the rule[;] 'Age is no antidote to clear inconsistency with a statute.'")(citations omitted).

In *Bergensen*, two foreign entities arbitrated their dispute in the U.S. under U.S. law. Bergensen prevailed. He sought to enforce the award in Switzerland (where defendant resided), but defendant objected, arguing that the Convention did not apply and therefore, under Swiss law, the award could not be enforced unless first confirmed under New York law. While the Swiss court had not decided the matter, Bergensen attempted to cover his bases by initiating an action in the U.S. to confirm the award. Bergensen, however, was out of luck – he had missed the statute of limitation for confirmation of arbitration awards under both New York state law and the FAA. *Bergensen v Joseph Muller Corp.*, 548 F.Supp. 650, 652 (S.D.N.Y. 1982). Bergensen thus sought the "lifeline" of the three year statute of limitations applicable to actions under the New York Convention, 9 U.S.C. § 207. *Id.* As the district court put it, if Bergensen did not prevail on this argument, and defendant's argument to the Swiss court about the need for a confirmation from a U.S. court was correct, then the arbitration award in its favor was effectively void, given that Bergensen had missed the New York and FAA limitations periods.

Bergensen was the proverbial "hard case" that made "bad law."[4] Given the context, the district court was motivated to conclude that the Convention applied in order to save Bergensen's rights. While noting a split in authority among district courts, *id* at 654, the *Bergensen* decision turned upon three basic arguments: (1) Since the federal court clearly had jurisdiction under the Convention to enforce an arbitration *agreement* involving a foreign party, it made no sense to not also have jurisdiction to enforce the *award*. *Id* at 653. (2) The U.S. sought to define "domestic" in 9 U.S.C. § 202, and given that definition, anything that was "commercial" and not purely domestic fell within the Convention. (3) There was a broad policy in favor of arbitration, and one of the purposes of the Convention was to encourage the enforcement of arbitration agreements and to unify the standards by which agreement to arbitration are observed and arbitral awards are enforced in the signatory countries. *Id* at 654.

On appeal, the district court's ruling was affirmed. After reviewing some history of the Convention, the Court of Appeals concluded only that:

> ...awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, *e.g.*, pronounced in accordance with foreign law or involving parties domiciled or having their principal place o business outside the enforcing jurisdiction.

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[4] *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979)(Berger, C.J., dissenting)("It is often observed that hard cases make bad law. I suspect there is some truth to that adage, for the 'hard' cases always tempt judges to exceed the limits of their authority,....").

The circuit court then echoed the three rationales of the district court set forth above, and additionally dismissed the argument by defendant that the district court's construction of the Convention could not have been the aim of Congress because it would remove too broad a class of awards from enforcement under the FAA. *Id* at 933-4. The court of appeals responded only that, "[t]here is no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the" FAA. *Id.*

Bergensen is wrongly decided and has been assailed by scholars of the Convention, yet was rotely followed without analysis by one other circuit court.[5] (*See,* van den Berg, *supra.*) The first argument used by the court - since the federal court clearly had jurisdiction under the Convention to enforce an arbitration *agreement* involving a foreign party, it made no sense to not also have jurisdiction to enforce the *award* – is a *non sequitor*. As the district court found, Bergensen would have been able to move under the FAA or New York law for enforcement, but he was barred by the

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[5] *Industrial Risk Insurers, supra.* The other cases cited by the Circuit Court are inapplicable. *Jain v. de Mere*, 51 F.3d 686 (7th Cir. 1995), and *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982), were actions to *enforce* arbitration, and thus involved Article II of the Convention, not Article I of the Convention regarding "awards" – the Article relevant in this case. *See also Coutinho, supra*, n. 4 (distinguishing case on this ground). Thus, for example, the "test" set forth in *Ledee* has no relevance, and does not suggest an answer to the issue in this case. *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 887 F.2d 1357 (9th Cir. 1989), is inapposite because it dealt with an arbitration award between a U.S. company and Iran rendered by an arbitral body sitting in the Hague. CST agrees that such an award is not "domestic" to the United States pursuant to the common law definition and thus falls under the Convention.

respective statutes of limitations. His lack of rights were his own doing, not an internal inconsistency within the Convention. This also does away with the third argument used by the *Bergensen* courts. The Convention in this case would have achieved its purposes – it would have let foreign courts recognize the award even though it was rendered in the U.S. As to enforcement, the local law remained in place, *i.e.*, the FAA or underlying New York law, or the law of Switzerland. That Bergensen missed the statute of limitations, while perhaps unfortunate, was no basis upon which to contort the purposes of the Convention and extend it beyond its terms or purpose. And not applying the Convention in that case was not inconsistent with the goals of the Convention – Bergensen simply missed the statute of limitations.

In this same regard, the Court of Appeal in *Bergensen* clearly erred when it permitted a construction of the Convention that permitted the removal of a huge category of cases from the FAA and state law. As set forth above, the legislative history of both the Convention and the implementing legislation demonstrates that *no violence* was to be done to local law by implementation of the Convention. Before the Senate Committee, it was observed that the purpose of the enabling legislation was "not to make any changes with respect to matters that are traditionally within the jurisdiction of the 50 States of the Union," and that the statute affected only the "jurisdiction" of the federal courts. (App. at 116a). Under *Bergensen*, however, it is clear that state and federal rights are dramatically affected. *Bergensen* itself proves the point: defendant, who had the right to rely upon the laws of New York and FAA, nevertheless had an award confirmed against it despite plaintiff having otherwise been time-barred under state and federal law. The *Bergensen* court might not have been aware of the pertinent legislative history, but at a minimum it adopted an unnecessarily broad

construction of the Convention. The Circuit Court in this case has no such excuse.

The next argument used in *Bergensen* – that 9 U.S.C. 202 defined "domestic" as used in Article I of the Convention – is also flatly contradicted by the legislative history quoted above, as well as the plain language of the statute. Obviously, Congress knew how to "define" a term when it wanted to, and could do so expressly. 9 U.S.C. § 202 is not globally definitional. Rather, the first sentence captures the U.S. reservation that limits application of the Convention to "commercial" contracts. Clearly, no one could reasonable assert that, if Section 202 said nothing more, then all "commercial" disputes – regardless of any other fact or factor – fell under the Convention. In other words, the first sentence did not describe the scope of the Convention, it merely reflected a limitation. The same logic applies to the second sentence; it meant no more than what it said, for the reasons clearly described in the Senate Report.

4. Impact of the Circuit Court's Ruling

The impact of the Circuit Court's ruling – beyond the violence to the clear language of Congress, the legislative history of the Convention and implementing legislation, and established canons of statutory construction, as well as the muddling of a variety of issues critical to international arbitration (*see van den Berg, supra* (App. at 183a-189a, 196a-197a)) - is to greatly expand the jurisdiction of the federal courts and, in so doing, shift power between the state and federal judicial systems. "Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Ruhrgas AG v. Marathon*

Oil Co., 526 U.S. 574, 583; 119 S.Ct. 1563;143 L.Ed.2d 760 (1999). As held in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998):

> Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.

523 U.S. at 101.

No proper construction of 9 U.S.C. § 202 supports the Circuit Court's Order. Accordingly, certiorari is sought to clarify this issue, resolve uncertainty in the lower courts, and preserve the proper scope of federal court subject matter jurisdiction.

B. THE FAA DOES NOT AUTOMATICALLY PREEMPT STATE LAW AS TO THE STANDARD OF REVIEW OF AN ARBITRATION AWARD

The Circuit Court held that the Federal Arbitration Act *per se* preempts the parties' contractual choice of law provision such that the FAA standard of review, and not the state law standard of review, applies to the review of the award. The Circuit Court has crafted a new, broad standard of FAA preemption which, consistent with its ruling as to the scope of the Convention, overreaches legislative and judicial precedent, including the principle of this Court's ruling in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). This is a recurring and core issue regarding arbitration which deserves clarification by this Court. Under the current state of confusion and conflict in the state and federal courts, the standard of review is unclear,

forum shopping prevails and, under rulings like those in this case, the parties' rights to have their chosen state law govern their dispute is being inappropriately trampled by over-broad findings of preemption.

In *Volt*, this Court held that, when the parties implemented a choice of law provision in their contract, the FAA did not preempt state law unless a conflict existed as to arbitrability. Since *Volt*, many courts have enforced this principle and have limitedly preempted state law. *See, e.g., Public Service Credit Union v. Ernest*, 988 F.2d 627 (6th Cir. 1993)(Michigan choice of law provision rendered FAA inapplicable); *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391 (D.C. Cir. 1995)(given general choice of law provision, state law 30 day statute of limitations to move to vacate arbitration award applies and is not preempted); *ASW Allstate Painting & Const. Co., Inc. v. Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. 1999)(motion to compel arbitration governed by general choice of law provision and not preempted by the FAA); *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322 (2nd Cir. 2004)(FAA did not preempt state law permitting a stay of arbitration pending other related state court litigation).

The Circuit Court below, which held that the FAA necessarily preempts the parties' stated desire to have Michigan law apply, wrongly abandoned *Volt* based upon an over-broad reading of *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L.Ed.2d 76 (1995). Academics have noted that, in the wake of *Mastrobuono*, parties and courts have been "confus[ed]"[6] as to the scope of FAA preemption, including whether a

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[6] Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2251-2 (June 2002)(referenced herein as "An Unnecessary Choice") (App. at 259a, 260a).

contractual choice of law provision should apply to the standard of review of an arbitration award.

The Circuit Court's reading of *Mastrobuono* as supporting a concept of "super" preemption is without support in *Mastrobuono* itself and contrary to *Volt*. The Circuit Court's view is, however, similar to that expressed by the Third Circuit Court of Appeals in *Roadway Package Sys. v. Kayser*, 257 F.3d 287 (3d Cir. 2001), *cert. den.*, 534 U.S. 1020, 122 S.Ct. 545, 151 L.Ed.2d 423 (2001), the only other circuit court to have addressed preemption as to the standard for vacatur.

In *Mastrobuono*, the contractual dilemma was between (a) an agreement to arbitrate, which incorporated the arbitration rules of the National Association of Securities Dealers, which in turn expressly contemplated arbitrators' ability to award punitive damages, and (b) a general choice of law provision incorporating New York law, under which punitive damages are not permitted. *Mastrobuono*, 115 S. Ct. at 1218. The controlling concept in *Mastrobuono* was that the will of the parties in an unambiguous contract governs, and if ambiguous, doubts are resolved in favor of the arbitral forum's "law" prevailing – in this case the NASD's rules. *Mastrobuono* did not purport to overrule *Volt*, nor did the issue before the Court require that leap.

Nevertheless, the Circuit Court's ruling in this case transmogrifies *Mastrobuono* into a general pronouncement that *any* state law which *might*, directly or indirectly, "limit[] the authority of arbitrators," should be automatically preempted, without any reference to state law. (App. at 20a-22a) The Circuit Court held that since the Michigan courts *might* engage in a more exacting review of the arbitration award under state law than would a court under the FAA, the

"federal policy of favoring protection of arbitrator authority is implicated."

This is a novel ruling and one which has far-reaching consequences for the role of the courts in the arbitral process. *Mastrobuono* only dealt with the issue of whether arbitrators would or would not be permitted to consider an issue (or grant certain relief); that is a far cry from what might happen *after* arbitration. Here, the only issue is whether Michigan law, which the parties unequivocally selected to govern their dealings, ought to be applied to determine whether the arbitrator's refusal to enforce a substantive provision in the parties' contract (the limitation of liability provision) should be vacated. Nothing in *Mastrobuono* changes the Court's comment in *Volt* that, "Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration – rules which are manifestly designed to encourage resort to the arbitral process – simply does not offend the rule of liberal construction set forth in *Moses H. Cone,* nor does it offend any other policy embodied in the FAA." *Volt*, 489 U.S. at 476. By necessity, it is also the case that state law rules governing the appeal of arbitration awards do not offend the issues of *arbitrability* as laid out in *Moses H. Cone.*

The Circuit Court's reading of *Mastrobuono* as supporting a concept of "super" preemption is unjustified, without support in *Mastrobuono* itself, contrary to *Volt* and decades of FAA case law, contrary in principle to decisions of at least three other Circuit courts (cited above), and impermissibly impinges on state law. Those cases and the scholarly commentary (*see* "An Unnecessary Choice," *supra* (App. at 259a); Gross, *Over-Preemption Of State Vacatur Law: State Courts And The FAA*, 3 J. AM. ARB. 1 (2004) (App. at 198a)) conclude that the FAA should be held to preempt state arbitration law only if (i) the parties' agreement is ambiguous and (ii) the state law would defeat FAA arbitrability policies

under *Moses H Cone*. Here, even if the contract is deemed ambiguous (although the choice of law provision, preceding, in the same paragraph, the arbitration provision, is unambiguous [App. at 104a-105a]), as already noted in *Volt*, state arbitration law provisions governing the standard of review for vacatur do not defeat FAA policies and hence state law should apply. This Court should side with those other Circuit courts which have upheld basic principles of federalism and preemption and reverse the Circuit Court's ruling.

The Circuit Court in this case relied upon the Third Circuit's opinion in *Roadway Package Sys., supra*, to bolster its reading of *Mastrobuono*, but *Roadway Package Sys.* has been criticized precisely because there is no basis in either Supreme Court precedent or established rules of federalism to *presume* that the FAA should trump state law on this issue. *See, e.g.*, concurring opinion in *Roadway Package Systems, Inc.*, 257 F.3d at 302-308; *Goff Group Inc. v. Greenwich Ins. Co.*, 231 F.Supp.2d 1147, 1153-55 (M.D. Ala. 2002); "An Unnecessary Choice," *supra*; Gross, *supra*. Rather, In *Volt*, the Court made clear that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476. Thus, the presumption should be one of state law, as selected by the parties, absent a *Volt*-style conflict.

Despite the apparent clarity of *Volt*, and the frequency with which this issue has been addressed by this Court, confusion reigns in the lower courts. For example, in *Ferro Corp. v. Garrison Industries., Inc.*, 142 F.3d 926 (6th Cir. 1998), the circuit court held that *Mastrobuono* effectively limits *Volt*, further finding that the Court weakened *Volt* in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). *Doctor's Associates*

does not stand for a weakening of *Volt*, and on the contrary this Court in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 n.9, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), went out of it way to state that *Mastrobuono* was not in conflict with *Volt*. Other decisions of this Court are in accord. *See Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). *See also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)(Thomas, J. concurring). Similarly, the *Volt/Mastrobuono* rulings have caused a split between the circuits as to whether parties may, in the first place, contract for a standard other than the FAA standard of review. *See* discussion in *Roadway Package Sys., supra* at 293 n.3. And as between state and federal courts, the answer turns largely upon where you are: federal courts more freely find FAA preemption while state courts generally find no preemption,[7] although, by the same token, there is widespread "confusion and inconsistency" as between different states and even within states (*see* Gross, *supra*, App. at 211a). Likewise, there is "confusion" among lower federal courts resulting in a morass of inconsistent principles" (*see* "An Unnecessary Choice," *supra*, App. at 261a, 269a).

This Court is respectfully requested to act to clarify this issue and correct the error of the Sixth Circuit. This is a recurring issue and one of significant confusion by parties and courts. It is also an important issue, implicating fundamental policies of arbitration and federalism. Indeed, the conflicts of the Courts of Appeals on related issues was the reason

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[7] *Compare Roadway Package Sys., supra* with *Moore v. Omnicare, Inc.*, P.3d __, 2005 WL 1705827 (Idaho 2005) (Idaho standard of review applied to arbitration award over the FAA); *Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 859 A.2d 742, 372 N.J. Super. 503 (2004) (same).

certiorari was granted in *Mastrobuono*. Action now by this Court can clarify a generally bedeviling topic and, on the specific issue of the standard for vacatur of an award, settle the field before the gap between state and federal court rulings, and within federal circuits themselves, becomes a chasm.

C. THIS COURT SHOULD NOT ENDORSE THE VIEW THAT FLAGRANT DISREGARD OF CONTRACTUAL PROVISIONS BY ARBITRATORS MEETS MUSTER UNDER THE FAA

The Sixth Circuit's opinion departs from established Supreme Court precedent and adopts a new, improper, and overly deferential standard of review of arbitration awards under the FAA, a standard which would permit an arbitration panel to consciously disregard a limitation of liability provision in the parties' contract simply because the clause would serve to limit liability. On this issue, the Honorable Eric Clay of the Sixth Circuit Court of Appeals dissented, stating "in my view this is the rare case where the award amounts to the arbitrators' 'own notions of industrial justice.'" (App. at 28a) There are no factual issues here to decide – the issue is purely one of applying guidelines previously stated by this Court: will the courts affirm an arbitration award which consciously ignored a limitation of liability clause on the express stated ground that the arbitrators simply did not like how it operated in this case?

The law here is not in dispute.

> Where "the applicable legal principle is clearly defined and not subject to reasonable debate" and "the arbitrators refused to heed that legal principle," we must set the arbitration award aside as being "'in manifest disregard of the law.'" *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953).

(App. at 29a.) Stated another way, the courts do not serve to simply rubberstamp decisions of arbitrators. *Federated Dept. Stores, Inc. v. J.V.B. Industries, Inc.*, 894 F.2d 862, 871 (6th Cir. 1990)(Martin, J., concurring).

On this issue, Appellant cannot better summarize the error of the arbitrators, the District Court and the Circuit Court more succinctly that Judge Clay's dissent from the Circuit Court's ruling as to this issue. Judge Clay concluded that the arbitrators, by disregarding the parties' agreement limiting damages in the event of breach of the contract, "completely failed to follow" Michigan law, and the "reasoning employed by the arbitrators constitutes the most unsupportable kind of speculation and conjecture, which 'flies in the face of clearly established legal precedent'" and "completely ignores Michigan law." (App. at 31a-32a).

The reasons stated by the arbitrators for ignoring the parties' bargained for limitation of liability clause demonstrates that the arbitrators simply chose to ignore the law and the parties' contract. The arbitrators reviewed the operation of the clause using a hypothetical. From this, they concluded that "[t]he potential effect of the limitation of damages clause is to ... exclude damages for a large breach of the Agreement while permitting damages for a small breach of contract." (App. at 70a-71a) Thus, while finding no ambiguity in the clause and clearly understanding how it was supposed to operate, the arbitrators simply exercised their own sense of "fair play" to make a different contract for the parties.

The arbitrators' ruling was as much manifest disregard of the law as a clear case of imposing the arbitrators' own brand of "industrial justice" at the expense of unambiguous contract provisions and the law. That such awards must be vacated has repeatedly been the conclusion of this Court. As aptly

summarized in *Beacon Journal Pub. Co. v. Akron Newspaper Guild*, 114 F.3d 596 (6th Cir. 1997):

> ... an arbitrator does not have unfettered discretion and when he or she departs from "even arguably construing the contract," this court must vacate the award. See *Enterprise Wheel*, 363 U.S. at 597, 80 S.Ct. at 1361 ("When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."). In fact, since *Misco*, this court has not backed away from reviewing an arbitrator's decision when that decision departs from any conceivable interpretation of the contract. *See, e.g., Ficks Reed Co.* v. *Local Union 112*, 965 F.2d 123, 126 (6th Cir. 1992) (affirming district court's decision to vacate arbitrator's award); *International Ass'n of Machinists* v. *Lourdes Hosp.*, 958 F.2d 154, 157 (6th Cir. 1992) (vacating arbitrator's decision).

Fundamental fairness and the well-settled rules of this Court require that this award be vacated. The Circuit Court's citation to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is a red flag that the court had to work too hard to uphold the award, and in any event, this Court has held that this general principle is not a blanket grant of judicial creationism. *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983).

As pointed out by Judge Clay in dissent, the Circuit Court's majority opinion departs from this established precedent by "limit[ing] its review of the arbitration award to *a recitation of permissible outcomes* under Michigan law, failing to examine whether the arbitrators *actually* applied the law, and ignoring the fact that 'a blatant disregard of the applicable rule of law will not be tolerated.'" (Clay, J.

(dissenting), App. at 29a; emphasis added.) Fabricating arguments which might, theoretically, justify the trumping of a limitation of liability clause is not the job of the courts. In a case like this, the arbitrators actually provided their rationale, and it is that rationale upon which the award must either be affirmed or vacated. "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597; 80 S.Ct. 1358; 4 L.Ed.2d 1424 (1960) (emphasis added). *See also L.L.T. Int'l, Inc. v. MCI Telecommunications Corp.*, 18 F.Supp.2d 349, 352 (S.D.N.Y. 1998)(court cannot go beyond the arbitrators' express rationale to justify an award).

And that rationale – an objection to the hypothetical operation of the clause, divorced from any factual or legal justification to nullify the clause under either a theory or "unconscionability" or "failure of essential purpose" – does not survive scrutiny. As stated by Judge Clay, "the arbitrators rested their entire decision on a hypothetical calculation that the limitation of damages clause would arguably operate to divest IMS of 'reasonable' damages under some circumstances. The reasoning employed by the arbitrators constitutes the most unsupportable kind of speculation and conjecture, which 'fl[ies] in the face of clearly established legal precedent.'" (App. at 32a; citation omitted; see also App. at 34a.) By affirming this award, the Circuit Court has ceded new ground to arbitrators, such that even when it is clear that they manifestly ignored the law, the award will nevertheless be upheld so long as the court can, *post hoc*, fabricate some supporting rationale, even though that rationale played no actual part in the arbitrators' award.

As our society turns more and more to arbitration as a means to resolve disputes, there must also be certainty and

comfort that arbitrators will not be permitted to simply run roughshod over the will of the parties as expressed in an enforceable and unambiguous contract. Turning a blind eye to such outcomes, or becoming an apologist for them as did the majority opinion of the Circuit Court, undermines the strong public policy of the FAA of *supporting* arbitration as a trusted means of dispute resolution outside of, but compatible with, the Constitutional judicial system. CST submits that the petition be granted on this issue in order to reinforce this important parameter on judicial oversight of arbitrator discretion.

CONCLUSION

For the foregoing reasons, CST respectfully requests that this Court issue a writ of certiorari to consider these three issues.

Respectfully Submitted,

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Dated: August 24, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-2521

[Filed May 27, 2005]

JACADA (EUROPE), LTD. FORMERLY KNOWN AS CLIENT/SERVER TECHNOLOGY (EUROPE), LTD., Plaintiff-Appellant,	)
v.	)
INTERNATIONAL MARKETING STRATEGIES, INC., Defendant-Appellee.	)

BEFORE: BOGGS, Chief Judge; CLAY, Circuit Judge; and WALTER,* District Judge.

* Hon. Donald E. Walter, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-2521

[Filed March 18, 2005]

JACADA (EUROPE), LTD. FORMERLY KNOWN AS CLIENT/SERVER TECHNOLOGY (EUROPE), LTD., Plaintiff-Appellant,	)
v.	)
INTERNATIONAL MARKETING STRATEGIES, INC., Defendant-Appellee.	)

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
Nos. 02-00078; 02-00479
Robert Holmes Bell, Chief District Judge

BEFORE: BOGGS, Chief Judge; CLAY, Circuit Judge; and WALTER,* District Judge.

OPINION

BOGGS, Chief Judge. This case concerns an arbitration award arising from an agreement between a Michigan corporation and a foreign corporation to distribute software overseas. Plaintiff appeals the district court's decision to uphold an arbitration award entered in favor of the Defendant. To resolve Plaintiff's appeal, however, we must first resolve two preliminary questions that present complicated and, within our court at least, novel questions of law. We must first determine the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Because we conclude that this arbitration award falls under the Convention, Plaintiff's case was properly removed to the district court. Our second inquiry is whether the federal or state standard for vacating an arbitration award should apply when the parties' agreement contains both an arbitration clause and a general choice-of-law provision requiring the application of a particular state's law. After deciding that the federal standard applies, we analyze the arbitrators' award under that deferential standard. We ultimately conclude that the arbitrators' decision in favor of Defendant drew its essence from the agreement and did not manifestly disregard the law. In reaching all these conclusions, we agree with the district court and we therefore affirm.

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* Hon. Donald E. Walter, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

I

Jacada (Europe), Ltd. ("Jacada") is a software development company incorporated in the United Kingdom that created a software package referred to as Jacada/400. International Marketing Strategies ("IMS") is a marketing firm incorporated in Michigan that offered expertise in attracting possible customers for software such as Jacada's. The two companies signed a Distribution Agreement, under which IMS received the right to market and distribute Jacada/400 throughout Europe, the Middle East, and Africa. Three provisions of this contract are crucial to this appeal. The parties agreed to a general choice-of-law provision stating, in its entirety, "this Agreement will be governed by the laws of the State of Michigan." J.A. 103. The Distribution Agreement also contained an arbitration clause specifying that all disputes under the agreement would be resolved "in Kalamazoo, Michigan, and exclusively by arbitration by the American Arbitration Association in accordance with its commercial arbitration rules." *Ibid.* Finally, the parties agreed to a limited liability provision, which included the following:

> Notwithstanding anything herein to the contrary, the maximum aggregate amount of money damages for which [Jacada] may be liable to IMS under this Agreement, resulting from any cause whatsoever other than for a breach by [Jacada] of any of its representations and warranties under paragraph 5(a), shall be limited to the amounts actually paid by IMS to Jacada under this agreement.

During the term of the agreement, both Jacada and IMS attempted to sell the Jacada/400 software package to another British company, JBA. When that company eventually

purchased the product, Jacada failed to compensate IMS for its efforts in securing the sale. The parties were unable to resolve the dispute between themselves, and IMS subsequently sought arbitration.

An American Arbitration Association panel conducted a five-day hearing concerning the sale to JBA. Following the hearing, the arbitrators issued an award for IMS consisting of one lump sum of $401,299 to be paid within thirty days and then 50% of JBA's nine remaining quarterly payments to Jacada, each of which was for £208,333.[1] In reaching this decision, the arbitrators expressly disregarded the limited liability provision excerpted above. They did so because they found that the provision "is unreasonable and unconscionable and . . . that it fails of its essential purpose."

Shortly thereafter, Jacada filed an action to vacate the arbitration award in Oakland County Circuit Court in Michigan. On the same day, IMS filed an action to enforce the award in the United States District Court for the Western District of Michigan. Because the state court action was filed first, albeit by only a few hours, the district court stayed the federal action. The state court suit was eventually transferred to Kalamazoo County Circuit Court, where IMS sought removal of the case on the sole ground that the case fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("Convention").

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[1] The arbitrators decided that the dollar amounts for these payments will be determined according to the exchange rate on the date that Jacada receives a payment from JBA.

With both cases then before it, the federal district court consolidated the two actions, naming the first-filed suit, to vacate the arbitration award, as the lead case. The district court subsequently issued two opinions. In the first, it determined that the arbitration fell under the Convention and that the Federal Arbitration Act ("FAA") therefore provided the correct standard of review. In the second decision, the court applied the FAA's standard of review and upheld the arbitrators' award. Jacada has timely appealed both decisions.

II

This case arrived before the district court in an unusual procedural posture that required the court to examine whether the dispute was properly before it. Because IMS is a Michigan corporation and Jacada is a British corporation, IMS could have removed the case on the basis of diversity jurisdiction. *See* 28 U.S.C. § 1332. In its notice of removal, however, IMS did not invoke the diversity of the parties; it only asserted the ground that the arbitration award fell under the Convention. Because it is the stated policy of this court that "[a]ll doubts as to the propriety of removal are resolved in favor of remand," *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999), we first resolve whether the Convention applies to the arbitration award before us.[2] Because we have no doubt that the Convention does indeed apply, we need not, and therefore do not, consider the jurisdictional question of

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[2] If the Convention applies to this case, IMS properly removed the state court suit. *See* 9 U.S.C. § 205 (authorizing the removal of cases in state court that relate to arbitration agreements or awards falling under the Convention); *see also* 9 U.S.C. § 203 (providing federal question jurisdiction to cases arising under the Convention regardless of the amount in controversy).

whether removal on the basis of diversity jurisdiction would be proper in this case.

To explain the Convention's applicability to the present dispute, we find it helpful to begin with some history from the Convention's drafting. The purpose of both this country's adoption of the Convention and the Convention itself was to encourage the recognition and enforcement of *international* arbitration awards and agreements.[3] *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974)(stating purposes of the Convention in light of academic commentary). This left an obvious question: what makes an arbitration award or agreement international or foreign? This question provoked considerable debate during the drafting of the Convention because different countries had different concepts of what made an award foreign. *See Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 931 (2d Cir. 1983) (summarizing the dispute); Albert Jan van den Berg, *When is an Arbitral Award Nondomestic Under the New York Convention of 1958?* 6 Pace L. Rev. 25, 32-38 (1985) (same). Generally, the divergence of opinion was between common law and civil law countries. *See Bergesen*, 710 F.2d at 931; van den Berg, 6 Pace L. Rev. at 32-35. Civil law countries, such as France, favored an approach where "the nationality of an award was determined by the law governing the

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[3] Earlier treaties raised significant legal and practical obstacles to the enforcement and recognition of arbitration agreements in international contracts. *See generally* Leonard v. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1054-55 (1961) (summarizing the existing treaties before the Convention and concluding that "the [preceding] treaties ha[d] eased the path of the defaulting defendant and the partial tribunal.").

procedure." *Bergesen*, 710 F.2d at 931; *see also* van den Berg, 6 Pace L. Rev. at 33-35 (quoting excerpts from delegates' remarks at the Convention). Under this approach, an arbitration award between two parties that took place in the United States, but applied Dutch law, would be considered domestic only in the Netherlands and foreign, or non-domestic, everywhere else, including the United States. *See Bergesen*, 710 F.2d at 931. Another group of countries, including the United States and United Kingdom, argued that common law countries would have difficulty applying such a distinction and favored a simple rule under which an award was domestic in the country it was entered and foreign elsewhere. *See ibid.* Applying that rule to the previous example, an arbitration award entered in the United States would be domestic in this country regardless of what substantive laws, Dutch or otherwise, were applied to it.

The language relevant to this appeal was drafted with this disagreement in mind. Article I(1) of the Convention states:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. *It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.*

Convention, art. I(1), 21 U.S.T. at 2519 (emphasis added). As written, the provision allows both approaches. Countries that preferred the territorial approach, such as the United States and the United Kingdom, are accommodated in the first sentence of Article I(1). The second sentence appeases the civil law countries' concern and leaves the question of

defining a domestic award up to the signatory countries. A strictly territorial approach is not barred by the second sentence; a signatory country favoring this approach would need only clarify that an award is considered domestic if rendered in that country.

In the present dispute, the issue is whether the award granted to IMS is governed by the Convention. The award could only fall under Article I(1)'s second sentence as an award "not considered as domestic" to this country.[4] *Ibid.* Therefore, stated more specifically, the issue before this court is the proper standard under federal law for determining whether an award is "not considered as domestic . . . ." *Ibid.* After resolving this issue, we will then determine whether that standard renders the present arbitration award "not domestic." Upon review of the statutory language and relevant sister circuit precedent, we conclude that 9 U.S.C. § 202 provides the definition of non-domestic for purposes of the Convention.

We begin by examining the statutory language. When Congress ratified the Convention in 1970, it also passed implementing legislation, found at 9 U.S.C. §§ 201-208. Of these provisions, only § 202 could offer a definition for whether an award is non-domestic. *See* 9 U.S.C. §§ 201, 203-208.[5] Section 202 reads,

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[4] No one disputes that the first sentence of the article does not apply to this award. That sentence concerns the situation where a party obtains an arbitration award in one country but seeks enforcement in another. In this case, IMS obtained and sought enforcement of the award in the United States.

[5] Section 201 simply implements the Convention. Section 203 grants federal jurisdiction over all cases falling under the

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. *An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.* For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202 (emphasis added). The section's first sentence makes the Convention applicable to all arbitration agreements considered commercial under federal law, subject to the exclusions in the second sentence.

Several aspects of § 202 convince us that its second sentence provides the standard for determining whether an

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Convention. Section 204 determines the venue in which those cases can be brought. Section 205 allows for removal of all cases under the Convention. Section 206 allows a court hearing a case concerning the Convention to order arbitration. Section 207 gives a party up to three years to seek an enforcement order. Section 208 states that the FAA applies to proceedings brought under the Convention so long as the statute does not conflict with the Convention or the implementing legislation found at §§ 202-207.

award is non-domestic.[6] As noted previously, § 202 is the only section of the implementing legislation that deals with any restrictions on which arbitral awards fall under the Convention. *See* 9 U.S.C. §§ 201, 203-08; *see also* n.5, *supra*. Furthermore, the section implicitly speaks to whether it applies to Article I by referring equally to both arbitration agreements and awards. *See* 9 U.S.C. § 202. Because Article I defines what arbitration awards fall under the Convention and § 202 engages in exactly the same inquiry, we can only read the section in light of that article. The first sentence of § 202, which applies the Convention only to arbitration awards "considered as commercial" by the standard found in the FAA, directly relates to Article I(3) of the Convention, under which a signatory country could limit applicability of the Convention to disputes considered commercial by that country. *See* Convention, art. I(3), 21 U.S.T. at 2519. Given that the first sentence of § 202 refers to Article I(3), we believe it is even more sensible to read the second sentence of § 202 as dealing with the issue presented by Article I(1).

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[6] Jacada argues that because § 202 did not create a definition of non-domesticity under the Convention, nothing has displaced the common law's standard for determining the foreign or domestic status of an award. *See Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 482 (7th Cir. 1997) ("An arbitration award made in *and* sought to be enforced in the United States is a domestic award according to traditional principles of Anglo-American conflicts of law, under which the law of the place of the award determines whether the award is valid.") (citing *Restatement (Second) of Conflict of Laws* § 220, cmt. c (1971)). For the reasons that follow, we disagree with Jacada and hold that § 202 is meant to create this definition. Having thus disposed of Jacada's premise, we have no reason to further address its conclusion.

Article I(1) states that an arbitration award will fall under the Convention if either the award was made in a country different than the country where enforcement is being sought, or the award is "not considered as domestic" in the country where enforcement is being sought. *See* Convention, art. I(1), 21 U.S.T. at 2519. Given that it is a simple factual inquiry to determine the country in which an arbitration award was made, we can divine no purpose for the second sentence of § 202 other than determining whether an award will be "not considered as domestic" under American law. In fact, all of the limitations in the second sentence of § 202 speak to the domestic or foreign nature of the award. The citizenship of the parties, the location of property involved in the dispute, where the agreement was to be performed or enforced, or whether the award contains another reasonable relation with a foreign country, *see* § 202, all impact whether an award is foreign or domestic in nature and have little relevance to any other inquiry. Therefore, we believe that the text of § 202 indicates that its second sentence is meant to define what constitutes a non-domestic award under the Convention.[7]

Arguing that Congress is well-acquainted with drafting definitions, Jacada contends that § 202 cannot be read to create one. Instead, Jacada claims the second sentence should be read according to its plain language as applying to a specific, limited instance concerning two American parties and nothing more. Therefore, on Jacada's reading, the section has no applicability in a case such as this one where one of

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[7] Our review of the legislative history further confirms our interpretation. The Senate Foreign Relations Committee stated in its summary of the implementing legislation that "[s]ection 202 defines the agreements or awards that fall under the Convention." S. Comm. on Foreign Relations, Foreign Arbitral Awards, S. Rep. No. 91-702, at 2 (1970).

the parties is a foreign corporation. For the reasons contained in the previous paragraphs, we disagree with Jacada's narrow reading of the statutory section. We cannot identify any reason, nor can Jacada direct us to any, why these many factors, all of which bear on the foreign or domestic nature of an award, were included in § 202 if that section was not meant to determine whether something is non-domestic. Moreover, Jacada's position that the second sentence has no applicability when one party is not a United States citizen places it in the perplexing position of arguing that the foreign identity of one of the parties to the suit actually makes a claim less likely to be governed by the Convention.

Our confidence in our conclusion is buttressed by the fact that each of our sister circuits to examine § 202 has interpreted it as creating a general standard for determining the applicability of the Convention. None of these courts read the section so literally as to preclude application of the section to situations where only one party is a United States citizen. In *Jain v. de Mere*, the Seventh Circuit stated, "Chapter 2 mandates that any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention." 51 F.3d 686, 689 (7th Cir. 1995). Similarly, in *Ledee v. Ceramiche Ragno*, the First Circuit applied the Convention in part because "a party to the agreement [is] not an American citizen, or . . . the commercial relationship has some reasonable relation with one or more foreign states." 684 F.2d 184, 186-87 (1st Cir. 1982). These two cases craft a general standard out of § 202; neither case limits the section's applicability to the situation of two United States citizens. Appellant correctly notes these cases were actions to compel arbitration, therefore implicating Article II of the Convention instead of Article I. This distinction, however, does not

eliminate the cases' analogical support. *See Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998) (joining the First and Seventh Circuits' determination of the scope of § 202). The section, on its plain terms, applies equally to "agreements or awards." *See* 9 U.S.C. § 202. These precedents confirm our reading of § 202 as creating a generally applicable standard for determining whether an award is domestic.

More to the point, all of our sister circuits that have considered this issue agree that § 202 contains the standard by which we determine whether an award is non-domestic under Article I(1) and therefore governed by the Convention. In *Bergesen*, the Second Circuit concluded that "Congress spelled out its definition of the concept of [non-domesticity] in section 202." 710 F.2d at 933. The Second Circuit stated that "awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." *Id.* at 932. More recently, after concluding that § 202 defined non-domesticity under the Convention, the Eleventh Circuit adopted the test articulated by the Second Circuit. *Indus. Risk Insurers*, 141 F.3d at 1441 ("We read [9 U.S.C. § 202] to define all arbitral awards not 'entirely between citizens of the United States' as 'non-domestic' for purposes of Article I of the Convention."). Though not applying the same test, the Ninth Circuit has reached the same conclusion about § 202's applicability and therefore adopted a similar approach. *See Ministry of Def. of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989) ("three basic requirements exist for jurisdiction to be conferred upon the district court: the award (1) must arise out of a legal relationship (2) which is

commercial in nature and (3) which is not entirely domestic in scope.").

Based on our reading of the statute and supported by these precedents, we conclude that 9 U.S.C. § 202 provides the definition for determining whether an award is "not considered as domestic" under Article I(1) of the Convention. Having so concluded, we have little difficulty determining that this arbitration award qualifies as non-domestic under § 202. As the second sentence of § 202 states, "An agreement or award . . . which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. In this case, the dispute is not entirely between citizens of the United States in that one of the parties, Jacada, is incorporated in the United Kingdom. The contract envisaged performance exclusively overseas, specifically in Europe, the Middle East, and Africa. In fact, the sale that prompted the present dispute was to JBA, a corporation headquartered in the United Kingdom. The property involved in the case, the Jacada/400 software package, was also in the United Kingdom. The award was therefore non-domestic under 9 U.S.C. § 202, and the Convention applies to this case. Because this dispute falls under the Convention, IMS properly removed the case to federal court, *see* 9 U.S.C. § 205, and the case is now properly before this court.

III

We now turn to Appellant's claim that the arbitrators' award should be vacated. Because the Convention applies to this dispute, we begin with the remedies it makes available. The Convention provides that an award may not be enforced

when "the award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. "Convention, art. V(1)(e), 21 U.S.T. at 2520. Because this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award.[8] *See Yusuf Ahmed Algahim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19-23 (2d Cir. 1997) (collecting cases and academic commentary in reaching the same conclusion). This dispute falls under the FAA because the parties' Distribution Agreement, containing the arbitration clause, is a "contract evidencing a transaction involving commerce."[9] 9 U.S.C. § 2.

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[8] In reaching this conclusion, we in no way limit the holding of *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844 (6th Cir. 1996). In that case, we held that a party seeking to vacate an arbitral award was limited to raising the exclusive grounds found in Article V of the Convention because the FAA does not apply to cases under the Convention if the FAA is "in conflict" with the Convention or its implementing legislation. *Id.* at 851; *see also* 9 U.S.C. 208. Unlike the award in *M & C Corp.*, which had been made in the United Kingdom, *see id.* at 846, the award in this case was made in the United States, and therefore Article V(1)(e) authorizes this court to consider our domestic law, as it is the law where the award was made. Therefore, the FAA and the Convention do not conflict in this case.

[9] An arbitration award can fall under both the Convention and the FAA. *See Lander Co.*, 107 F.3d at 481 (holding that a dispute is governed by both the Convention and the FAA because "nothing in the Convention or its history, or in the implementing legislation or *its* history, suggests exclusivity [from the FAA] . . . ."); *Bergesen*, 710 F.2d at 934 ("There is no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act."). In fact, dual coverage is contemplated by the Convention's implementing legislation. *See* 9

Though the award falls under the FAA, we must still decide what standard of vacatur to apply to the award because "the central purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). In this case, IMS and Jacada agreed to arbitrate their dispute. But they also agreed to a general choice-of-law provision stating, in its entirety, "[t]his Agreement will be governed by the laws of the State of Michigan." J.A. 103. In light of this choice-of-law provision, the issue before this court is whether the parties intended to opt out of the FAA's standard for vacatur in favor of Michigan's more thorough standard of review. *See generally Detroit Auto. Inter-Insurance Exch. v. Gavin*, 416 Mich. 407, 331 N.W.2d 418, 429-35 & 435 n.11 (Mich. 1982) (determining Michigan standard of review and noting that while the Michigan and federal statutes are similar, Michigan courts apply more thorough review). To resolve this issue, we must interpret the parties' contract and then decide, as a matter of law, whether the choice-of-law provision in that contract is intended to apply Michigan's standard of review for arbitral awards. We review this issue *de novo*. *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 931 (6th Cir. 1998).

Our sister circuits that have considered this question have decided that a *generic* choice-of-law provision does not displace the federal standard for vacating an arbitration

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U.S.C. § 208 (the FAA applies to cases under the Convention except where the two are in conflict).

award. *See Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 341-43 (5th Cir. 2004) ("we hold that the Agreement's choice-of-law provision does not express the parties' clear intent to depart from the FAA's vacatur standard."); *Roadway Package Sys. v. Kayser*, 257 F.3d 287, 293-300 (3d Cir.) ("we need to establish a default rule, and the one we adopt is that a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards."), *cert. denied*, 534 U.S. 1020, 122 S. Ct. 545, 151 L. Ed. 2d 423 (2001). However, we need not look only to other courts in analyzing the issue because our previous opinion in *Ferro* provides considerable guidance. In that case, we were confronted with the question of whether an agreement including both an arbitration clause and a general choice-of-law clause should be interpreted to require the application of Ohio or federal law to the issue of fraudulent inducement. *Ferro*, 142 F.3d at 931. This question mattered a great deal because Ohio law arguably dictated that a claim of fraudulent inducement cannot be submitted to an arbitrator, whereas the Supreme Court has held that, under the FAA, a claim of fraudulent inducement is ordinarily decided by an arbitrator. *See ibid.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 403, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) (deciding issue under the FAA)). Applying *Mastrobuono*, we held that the parties did not intend to displace the federal approach to the issue because the choice-of-law clause was "not an 'unequivocal inclusion' of the Ohio rule . . . ." *Id.* at 937.

We hesitate, however, to reach the same conclusion automatically in this case because, as Jacada correctly argues, the issue in *Ferro* strongly implicated the long-standing federal policy that "ambiguities as to the scope of the arbitration clause itself [should be] resolved in favor of

arbitration." *Volt*, 489 U.S. at 476 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). Applying Ohio's rule would essentially have placed the dispute in the hands of the courts, not the arbitrator, thereby "effectively abrogating the arbitration agreement *in toto*." 142 F.3d at 936 (distinguishing *Volt* on this ground). The present issue concerns what standard of vacatur should be applied and thus does not impact the scope of the arbitration clause. The arbitrability of the case is not called into dispute by applying either standard of vacatur. Instead, the amount of deference paid to the arbitrators' decision is at issue; but that is different than the "scope of the arbitration clause itself." *Volt*, 489 U.S. at 476.

However, as the Supreme Court made clear in *Mastrobuono*, when interpreting an agreement covered by the FAA, "due regard" must be given not only to the federal policy favoring arbitrability, but also the federal policy favoring arbitrator discretion. *See* 514 U.S. at 62. Therefore, the Court decided that

> the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include *special rules limiting the authority of arbitrators*. Thus the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers the arbitration.

Id. at 63-64 (emphasis added). This federal policy favoring protection of arbitrator authority is implicated by standards of vacatur. While we hesitate to characterize Michigan's standard for vacatur as a "special rule," applying that

standard instead of the more liberal federal standard limits the authority of arbitrators by applying greater judicial scrutiny to their decisions. We must therefore interpret the present agreement giving due regard to this policy.

With this consideration in mind, we return to the agreement before us. The Distribution Agreement contains a generic choice-of-law provision and an equally generic arbitration clause. Faced with similarly generic provisions, *see id.* at 58-59, the Court in *Mastrobuono* focused its attention on the generality of the choice-of-law provision, *see id.* at 59-62 (stating sections of arbitration agreement and analyzing both the choice-of-law and arbitration provisions), *see also Roadway Package Sys.*, 257 F.3d at 293 (summarizing *Mastrobuono*'s reasoning). Just as in *Mastrobuono*, the choice-of-law clause could be read as only specifying what state contract law the parties wished to use. *See Mastrobuono*, 514 U.S. at 59 ("the choice-of-law provision . . . may reasonably be read as merely a substitute for the conflict-of laws analysis that otherwise would determine what law to apply to disputes arising out of a contractual relationship."); *see also Roadway Package Sys.*, 257 F.3d at 293 (discussing the ubiquity of such provisions in commercial agreements and the need for them as a method of resolving horizontal choice-of-law questions). Also, just as in *Mastrobuono*, the parties here entered into an agreement in which, without the choice-of-law provision, the FAA rule would apply. *See Mastrobuono*, 514 U.S. at 59 ("in the absence of contractual intent to the contrary, the FAA would pre-empt the [New York state] rule."). Finally, also as in *Mastrobuono*, the clause does not unequivocally suggest an intent to displace the default federal standard. *See id.* at 62 ("At most, the choice-of-law provision introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards."); *see also Roadway Package*

Sys., 257 F.3d at 294-95 (drawing the same conclusion about the choice-of-law clause in that case based on *Mastrobuono*'s language).

Considering the federal policy in favor of arbitration, and after interpreting the agreement's choice-of-law provision in light of the Supreme Court's reading of a similar agreement in *Mastrobuono*, we reach the same conclusion as our sister circuits. We do not believe that the parties intended to displace the federal standard for vacatur when the only evidence of such intent is a generic choice-of-law provision. The arbitration award is to be reviewed according to the federal standard for vacatur.

IV

Having determined that the federal standard of vacatur applies, our final inquiry is whether the arbitrators' award should be affirmed. Because the arbitrators drew the essence of their award from the agreement and did not manifestly disregard the law, we affirm the district court's decision to enforce the arbitrators' decision. We review the district court's decision to uphold an arbitration award for clear error on findings of fact and *de novo* on questions of law. *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000). In contrast, our review of an arbitration award itself is strikingly deferential. *See Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003). Under 9 U.S.C. § 10(a), we can only overturn an award if the arbitrators engaged in misconduct, *see* § 10(a)(1)-(3), or "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made," § 10(a)(4). Because there has been no allegation of misconduct, we focus only on § 10(a)(4). We must enforce an award if "the arbitrator's award draws its essence from the

. . . agreement, and is not merely his own brand of industrial justice." *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 36, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)). *See also Nationwide Mut. Ins. Co.*, 330 F.3d at 846 (applying *Misco* to commercial arbitration dispute); *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990) (same). In doing so, we must affirm the arbitration award if the arbitrator was "even arguably construing or applying the contract." *Misco*, 484 U.S. at 38. In addition, we can overturn an arbitration award if it displays "manifest disregard of the law." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995).

After the arbitrators decided that IMS deserved payment from Jacada for its role in securing the sale to JBA, the arbitrators were faced with determining the size of IMS's award. In this case, the parties agreed to a limited liability provision, which stated,

> [n]otwithstanding anything herein to the contrary, the maximum aggregate amount of money damages for which [Jacada] may be liable to IMS under this Agreement, resulting from any cause whatsoever other than for a breach by [Jacada] of any of its representations and warranties under paragraph 5(a), shall be limited to the amounts actually paid by IMS to Jacada under this Agreement.

The arbitrators did not apply the provision in determining the amount of IMS's award because they found that the provision "is unreasonable and unconscionable and . . . that it fails of its essential purpose."

We believe the arbitrators' award draws its essence from the agreement. Though the arbitrators disregarded the limited liability provision, deciding not to apply such a provision cannot, in and of itself, mean that an award must be vacated. *See Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1219 (5th Cir. 1990) ("The arbitration panel clearly acted within the scope of its authority by reading the contract to avoid a result which would impute to the contract an unconscionable bargain."); *St. Luke's Hosp. v. SMS Computer Sys., Inc.*, 1993 U.S. App. LEXIS 13549, Nos. 92-1205, 92-1206, 1993 WL 188457, at *10 (6th Cir. June 1, 1993) (unpublished opinion) ("There is no doubt that an arbitrator, if he so decides, may indeed refuse to enforce such a damage limitation provision on the ground of unconscionability or on other grounds . . . ."). In this case, the arbitrators noted that "the potential effect of the limitation of damages provision is to. . . exclude damages for a large breach of the Agreement while permitting damages for a small breach of contract." J.A. 93. In other words, the effect of the limited liability provision would be to render IMS's distributorship rights under the agreement meaningless. The arbitrators, therefore, disregarded the provision to effectuate a core purpose of the contract, IMS's right to distribute the Jacada/400 software package throughout Europe, the Middle East, and Africa. That right means nothing without an effective remedy. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147, 2 L. Ed. 60 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.") The arbitrators, then, were certainly "arguably construing . . . the contract." *Misco*, 484 U.S. at 48. They were seeking to give the contract what to them was its intended meaning; and we will not reverse their plausible interpretation.

Still, we must determine whether the arbitrators' decision displays "manifest disregard of law." *Merrill Lynch*, 70 F.3d at 421. This too is a highly deferential standard. To merit reversal, the award "must fly in the face of clearly established legal precedent." *Ibid.* Arbitrators act in manifest disregard if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Nationwide Mut. Ins. Co.*, 330 F.3d at 847 (quoting *Dawahare*, 210 F.3d at 669). Upon review, we cannot say that the arbitrators' conclusions that the limited liability provision was unconscionable or fails of its essential purpose displayed manifest disregard of Michigan law, the substantive contract law to which the parties agreed. *Cf.* part III, *supra*.

The landmark case for unconscionability under Michigan law is *Allen v. Mich. Bell Tel. Co.*, 18 Mich. App. 632, 171 N.W.2d 689 (Mich. Ct. App. 1969). Under that case, a court investigating whether a provision is unconscionable asks two questions: "(1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable?" *Id.* at 692. The first question relates to procedural unconscionability; the second substantive. Often courts take a balancing approach to this question, requiring a certain amount of both procedural and substantive unconscionability. *Citizens Ins. Co. v. Proctor & Schwartz*, 802 F. Supp. 133, 144 (W.D. Mich. 1992); *overruled on other grounds by Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 242 (6th Cir. 1994). Though there are obviously cases with outcomes adverse to IMS's position, *see, e.g.*, *WXON-TV, Inc. v. A.C. Nielsen Co.*, 740 F. Supp. 1261 (E.D. Mich. 1990), no case eliminates the arbitrators' decision from reasonable debate.

The arbitrators did not disregard clearly established legal precedent in determining that the limited liability provision was substantively unreasonable. The arbitrators recognized that the limited liability provision could potentially exclude damages for large breaches of the agreement.[10] Though Jacada can point to cases in which parties recovered a minuscule percentage of their claimed damages because of limited liability provisions, *see Cognitest Corp. v. Riverside Publ. Co.*, 107 F.3d 493, 497 (7th Cir. 1997) (limiting plaintiff to 0.5% of its claimed damages), it can point to no clear statement of Michigan law that makes the provision in this case *per se* substantively reasonable.

Similarly, there exists no clearly established principle barring a finding of procedural unconscionability. Jacada emphasizes that both it and IMS were commercial entities, but Michigan law does not preclude finding a provision unconscionable in such a circumstance. In fact, the plaintiff in *Allen*, the leading Michigan case on this issue, was an independent insurance agent, who was buying advertising for his business. *See Allen*, 171 N.W.2d at 690. Instead, the essential inquiry under Michigan law is the comparative bargaining power of the two parties. *See id.* at 692. There is little law preventing arbitrators from considering that IMS's smaller size coupled with the unique features of the Jacada/400 software package rendered the bargaining power between the two sides sufficiently unequal as to allow a conclusion of unconscionability.

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[10] Under the arbitrators' calculations, IMS was likely to eventually receive roughly 3 million dollars. If the limited liability provision applied, the parties agree that IMS would receive $126,000, or less than five percent of the arbitrators' determination of what it deserved under the agreement.

We similarly conclude that the arbitrators did not manifestly disregard the law in concluding that the limited liability provision failed of its essential purpose. Jacada argues that "failure of its essential purpose" is exclusively a principle derived from the Uniform Commercial Code and therefore has no applicability outside that context. Courts, however, have analyzed whether a contractual provision fails of its essential purpose in cases not governed by the U.C.C. *See WXON-TV*, 740 F. Supp. at 1262, 1266-67 (though noting "that the U.C.C. has no application to [the disputed] contract," still discussing and rejecting claim that the limited liability provision fails of its essential purpose under Michigan law); *Networktwo Communications Group, Inc. v. Spring Valley Mktg. Group & Community ISP, Inc.*, 2003 U.S. Dist. LEXIS 3501, No. 99-72913, 2003 WL 1119763 at *4 (E.D. Mich. Feb. 13, 2003) (unpublished opinion) (citing *WXON-TV* and analogizing to its reasoning) *aff'd*, 372 F.3d 842 (6th Cir. 2004). These cases also demonstrate that courts are not limited to discussing whether a remedy fails of its essential purpose only because of changed circumstances. In *WXON-TV* and *Networktwo Communications Group*, both courts, employing Michigan law, analyzed and rejected plaintiffs' arguments that limited liability provisions failed of their essential purposes. In neither case did the court limit itself to not having found changed circumstances; in fact, neither opinion mentions whether the circumstances surrounding the parties' relationship changed. Instead, both courts rejected plaintiffs' arguments based on a direct examination of the terms of the disputed contracts. *See WXON-TV*, 740 F. Supp. at 1266-67; *Networktwo Communications Group*, 2003 U.S. Dist. LEXIS 3501, 2003 WL 1119763 at *4. Though the arbitrators in our case reached a different outcome, these cases show that the arbitrators' consideration of the doctrine did not contradict clearly established legal principles. Thus, the arbitrators' award does not display manifest disregard of

Michigan's law concerning failure of an essential purpose or unconscionability. Because the award also draws its essence from the agreement, we affirm the arbitrators' award.

V

For the reasons stated above, we AFFIRM the judgment of the district court.

CONCURRING IN PART, DISSENTING IN PART

CLAY, Circuit Judge, concurring in part and dissenting in part. I fully concur in parts I-III of the Court's opinion; however, I write separately with respect to part IV of the Court's opinion, because I believe that the arbitration award manifestly disregards applicable law. Notwithstanding our narrow standard of review, in my view this is the rare case where the award amounts to the arbitrators' "own notions of industrial justice." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1960); *Beacon Journal Publ'g Co. v. Akron Newspaper Guild*, 114 F.3d 596, 598-99 (6th Cir. 1997).

The arbitrators voided the limitation of damages clause in the parties' agreement because they found it to be "unreasonable and unconscionable," and further found "that it fails of its essential purpose." (J.A. at 74.) The majority is correct that under Michigan law an arbitrator may refuse to apply a limitation of damages provision for unconscionability, and this Court "may not reject [the arbitrator's] findings simply because it disagrees with them." *United Paperworkers Int'l Union*, 484 U.S. at 38, 108 S. Ct. 364; *cf. Anaconda Co. v. District Lodge No. 27 of the Int'l Ass'n of Machinists and Aerospace Workers*, 693 F.2d 35, 37-8 (6th Cir. 1982) ("'Manifest disregard of the law' means more than a mere

error in interpretation or application of the law."). However, the majority limits its review of the arbitration award to a recitation of permissible outcomes under Michigan law, failing to examine whether the arbitrators actually applied the law, and ignoring the fact that "a blatant disregard of the applicable rule of law will not be tolerated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995). Where "the applicable legal principle is clearly defined and not subject to reasonable debate" and "the arbitrators refused to heed that legal principle," we must set the arbitration award aside as being "'in manifest disregard of the law.'" *Id.* (quoting *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953)).

Michigan law is guided by "the general principle that individuals are fully competent to enter into any contract which they wish to enter into and may obligate themselves to perform in any manner provided the contract is not in violation of any penal laws or public policy of the state." *Michigan Ass'n of Psychotherapy Clinics v. Blue Cross and Blue Shield of Michigan*, 101 Mich. App. 559, 301 N.W.2d 33, 40 (Mich. Ct. App. 1981). The leading Michigan case regarding unconscionability in a commercial setting, *Allen v. Michigan Bell Telephone Co.*, makes clear that in order to void a limitation of damages clause for unconscionability, there must be a finding of both substantive and procedural unconscionability. 18 Mich. App. 632, 171 N.W.2d 689, 692 (Mich. Ct. App. 1969) ("There are then two inquiries in a case such as this: (1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable?"). *Allen* narrowly defines unconscionability as "'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the

other party.'" *Id.* (quoting *Williams v. Walker-Thomas Furniture Co.*, 121 U.S. App. D.C. 315, 350 F.2d 445, 449 (D.C. Cir. 1965)).

> Thus, merely because the parties have different options or bargaining power, unequal or wholly out of proportion to each other, does not mean that the agreement of one of the parties to a term of a contract will not be enforced against him; if the term is substantively reasonable it will been forced. By like token, if the provision is substantively unreasonable, it may not be enforced without regard to the relative bargaining power of the contracting parties.

Id. Allen involved a contract between a plaintiff who wanted to advertise in the yellow pages and the phone company that printed the telephone book. The Michigan Court of Appeals found that the limitation of damages clause in the parties' contract was procedurally unconscionable because the parties were not in positions of equal bargaining power; since the defendant printed the only telephone book in the geographic area, the plaintiff was either forced to accept the contract or forego advertising in the yellow pages. *Id.* at 639-40. The limitation of damages clause was also found to be substantively unconscionable because it *completely* absolved the phone company from any liability in the event of a breach of contract. *Id.* at 640.

Allen's result is atypical, and was later recognized as such by the Michigan Court of Appeals. *See Michigan Ass'n of Psychotherapy Clinics*, 301 N.W.2d at 40 (highlighting that court's "primary concern" in *Allen* "was that plaintiff was contracting with a public utility which, in essence, had a monopoly on the type of advertising sought"); *see also Northwest Acceptance Corp. v. Almont Gravel, Inc.*, 162

Mich. App. 294, 412 N.W.2d 719, 723-24 (Mich. Ct. App. 1987) (emphasizing that a finding of unconscionability requires lack of realistic choice for one party coupled with contract terms that are unreasonably favorable to the other party). "Whether a contractual provision is substantively unreasonable or unconscionable depends on the commercial setting, purpose and effect of the provision." *Id.* at 41. Other courts that have interpreted Michigan law, including this Court, have noted that "unconscionability is rarely found [**44] to exist in a commercial setting." *Citizens Ins. Co. of Am. v. Proctor & Schwartz, Inc.*, 802 F. Supp. 133, 143 (W.D. Mich. 1992), *overruled on other grounds by Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 242 (6th Cir.1994); *accord U.S. Fibres v. Proctor & Schwartz, Inc.*, 509 F.2d 1043, 1048 (6th Cir. 1975); *WXON-TV, Inc. v. A.C. Nielsen Co.*, 740 F. Supp. 1261, 1264 (E.D. Mich. 1990).

I recite the applicable Michigan law relating to unconscionability to emphasize that in voiding the limitation of damages provision in the instant case, the arbitrators completely failed to follow that law. The majority claims that "[t]here is little law preventing arbitrators from considering that IMS's smaller size coupled with the unique features of the Jacada/400 software package rendered the bargaining power between the two sides sufficiently unequal as to allow a conclusion of unconscionability." Maj. Op. at 10-11. Whatever merit that statement may have in the abstract, it is clear that the arbitrators made no such findings regarding IMS's size in relation to Jacada's, or the 'unique features' of Jacada/400. The arbitration award contains no inquiry into, and no discussion of, the relative bargaining strength of the parties, nor does the award discuss or recite any evidence indicating that IMS was faced with a lack of meaningful choice in entering into the contract with Jacada. The

arbitrators also failed to point to any evidence or testimony indicating that the limitation of damages clause was substantively unreasonable. Rather, the arbitrators rested their entire decision on a hypothetical calculation that the limitation of damages clause would arguably operate to divest IMS of 'reasonable' damages under some circumstances. (J.A. at 74.) The reasoning employed by the arbitrators constitutes the most unsupportable kind of speculation and conjecture, which "fl[ies] in the face of clearly established legal precedent." *Merrill Lynch*, 70 F.3d at 421.

Additionally, although the arbitrators alternatively employed a hypothetical calculation to find that the limitation of damages provision fails of its essential purpose, the arbitrators made no argument that the provision failed of its essential purpose in light of Jacada's actual breach. The arbitrators found that application of the limitation of damages provision here would limit IMS to $ 125,937.91 in damages, but then the arbitrators went on to discuss the "potential effect" of the limitation of damages provision using completely hypothetical figures. *Id.* This reasoning completely ignores Michigan law, under which failure of essential purpose is a default remedy under the Uniform Commercial Code ("UCC"), and is applied incases where a limitation of damages clause *actually* fails of its essential purpose. *See* MICH. COMP. LAWS ANN. § 440.2719(2) (2004) ("Where *circumstances cause* an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.") (emphasis added). The UCC provision

> should be triggered only when the remedy [in the parties' agreement] fails of its essential purpose. That is, when unanticipated circumstances cause the seller to be unable to provide the buyer with the remedy to which the parties agree, that remedy has failed of its

> essential purpose. It is a different question entirely if the remedy is unreasonable or unconscionable, for in such event it may not fail of its essential purpose although it leaves the buyer without an adequate remedy as to some part of the actions required to cure the problem.

Price Bros. Co. v. Charles J. Rogers Constr. Co., 104 Mich. App. 369, 304 N.W.2d 584, 586 (Mich. Ct. App. 1981); *see also Severn v. Sperry Corp.*, 212 Mich. App. 406, 538 N.W.2d 50, 54-5 (Mich. Ct. App. 1995) ("[D]efendant did not give any indication of an ability or willingness to discover and fix the problem . . . Under these circumstances, we believe [] there was sufficient evidence to conclude that defendant's limited written warranty failed of its essential purpose."); *Krupp PM Eng'g, Inc. v. Honeywell, Inc.*, 209 Mich. App. 104, 530 N.W.2d 146, 149 (Mich. Ct. App. 1995) ("Moreover, because plaintiff was deprived of its furnace for eighteen months and the furnace was not completely fixed for three years, the warranty failed of its essential purpose."); *Kelynack v. Yamaha Motor Corp., USA*, 152 Mich. App. 105, 394 N.W.2d 17, 20 (Mich. Ct. App. 1986) (warranty provision in sales contract failed of its essential purpose where motorcycle became inoperable within ten weeks of purchase due to defect and dealer failed to repair in a timely manner). In addition, the Michigan Court of Appeals has explicitly stated that because the failure of essential purpose doctrine is grounded in the UCC, it is inapplicable in cases not otherwise governed by the UCC, *i.e.*, in cases where the parties have not contracted for the sale of goods. *See Plymouth Pointe Condo. Ass'n v. Delcor Homes-Plymouth Pointe, Ltd.*, 2003 Mich. App. LEXIS 2742, No. 233847, 2003 WL 22439654 at *2 (Mich. Ct. App. Oct. 28, 2003). In non-UCC cases, "there is no need to adopt by analogy a UCC concept in analyzing the limited

warranty," because the common law mechanism of unconscionability exists. *Id.*[1]

In the current case, the arbitrators made absolutely no finding that there were unanticipated circumstances which caused the limited remedy bargained for by the parties to be unavailable. Furthermore, the arbitrators ignored the fact that the parties are two businesses that engaged in an arm's length transaction supported by consideration. "The law presumes that business people are fully competent to enter into contracts and obligate themselves to perform in any manner they wish," *WXON-TV*, 740 F. Supp. at 1264, and nothing in the arbitration award suggests that the limitation of damages clause bargained for by the parties failed to operate in exactly the manner contemplated at the time the agreement was entered into. Thus, the conception of the failure of essential purpose doctrine contemplated by the arbitrators' award has no basis whatsoever in Michigan law.

Although I concur in parts I-III of the Court's opinion, I respectfully dissent from part IV. I would vacate the arbitration award's calculation of damages and remand to the arbitrators for further findings in light of clearly established Michigan law.

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[1] Although *Plymouth Pointe* was decided after the arbitration award in this case was issued, the court relies on Michigan cases that existed at the time the arbitrators rendered their decision.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:02-CV-479 and File No. 1:02-CV-78

[Filed March 31, 2003]

JACADA (Europe), LTD, f/k/a Client/Server Technology (Europe), Ltd., Plaintiff,	)
v.	)
INTERNATIONAL MARKETING STRATEGIES, INC., Defendant.	)

ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

OPINION

These consolidated actions, one to vacate an arbitral award, and one to enforce the same arbitral award, are currently before the Court for a determination of the applicable standard of review.

I.

Jacada (Europe) Ltd., formerly known as Client/Server Technology (Europe), Ltd. (hereinafter "Jacada") is a software developer incorporated in the United Kingdom. International Marketing Strategies (hereinafter "IMS") is a Michigan corporation.

On May 2, 1997, Jacada entered into a Distribution Agreement with IMS whereby IMS obtained the exclusive right to market and distribute certain computer software developed by Jacada throughout Europe, the Middle East, and Africa. The Distribution Agreement contained the following provision:

> This Agreement will be governed by the laws of the State of Michigan. (The United Nations Convention on Contracts for the International Sale of Goods [1980] shall not apply.) . . . All disputes hereunder shall be resolved exclusively in Kalamazoo, Michigan, and exclusively by arbitration by the American Arbitration Association in accordance with its commercial arbitration rules.

(Distribution Agreement at ¶ 11(g)).

During the term of the Distribution Agreement, a dispute arose over its interpretation and application to a particular sale. IMS initiated an arbitration proceeding with the American Arbitration Association pursuant to paragraph 11(g) of the Distribution Agreement. On April 3, 2001, the arbitration panel issued its award in favor of IMS in the amount of $401,299.00 to be paid within thirty days from the date of the award, and fifty percent of nine remaining payments of £203,033 (pounds sterling) to be paid in periodic

payments through February 1, 2003. Thereafter, Jacada filed a complaint in the Circuit Court for the County of Oakland to vacate the arbitral award and IMS filed a complaint in this Court to enforce the arbitral award.

The two actions were ultimately consolidated in this Court and are currently before this Court for a determination as to the applicable standard of review. Jacada contends that because the parties agreed that the Distribution Agreement was governed by Michigan law, and because the arbitral award was rendered in Michigan, any action to challenge or enforce an arbitral award should also be governed by Michigan law. IMS, on the other hand, contends that because one of the parties is foreign and because the underlying contract relates to foreign commercial activity, review of the arbitral award is governed by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208 (the "Convention").

II.

Jacada contends that the issue of whether the Convention applies to this dispute has already been determined by this Court and should not be revisited.

In response to Jacada's motion to stay proceedings in this Court pending resolution of the state court action, this Court determined in an opinion dated August 13, 2001, that the Convention did not apply. This Court opined that state law applies in this case because the arbitration agreement was formed under Michigan contract law and the award was issued in Michigan applying Michigan arbitration law. This Court noted in that opinion that despite one of the parties being a foreign corporation, the award was a domestic award and therefore did not come under the Convention.

Memorandum Opinion and Order, 8/13/03, at 3 (Docket # 13) (citing Restatement (Second) of Conflicts of law § 220, comment c (1971)). In the alternative, this Court noted that even if the Convention applied, Articles V and VI of the Convention allows the court to stay proceedings when there is a parallel proceeding in a court of competent authority. *Id.* It is evident from the cursory treatment of this issue and the alternative basis for the Court's decision, that this Court did not make a definitive ruling on the applicability of the Convention.

IMS filed a motion for reconsideration. In an opinion dated August 31, 2001, this Court acknowledged that it had subject matter jurisdiction over the case, but indicated that it was exercising its discretion to stay the matter in the interests of preserving judicial resources. This Court further stated that IMS's arguments could be heard if the case were removed from state court. Memorandum Opinion and Order, 8/31/03, at 2 (Docket # 16). In other words, this Court essentially invited IMS to reargue the issue of the applicability of the Convention when and if this matter returned to federal court. The case has now returned to federal court. The Court is satisfied that it is proper at this time to review the issue of the applicability of the Convention.

III.

The Convention is a United Nations treaty to which the United States became a party in December 1970. 9 U.S.C. § 201. Legislation implementing the Convention is codified in Chapter 2 of Title 9 of the United States Code. 9 U.S.C. §§ 201-208. "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts

and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974), *quoted in Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir. 1976); *Indocomex Fibres PTE v. Cotton Co.*, 916 F. Supp. 721, 726 (W.D. Tenn. 1996).

Article I of the Convention provides:

> This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to the arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Convention, Article I(1) (emphasis added).

It is undisputed that since the arbitral award in this case does not meet the territorial criterion expressed in the first sentence of Article I(1). "Simply put, it is not a foreign award as defined in Article I(1) because it was not rendered outside the nation where enforcement is sought." *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983). The critical issue for this Court is whether the arbitral award which states that it was made in Southfield, Michigan, is a non-domestic award as contemplated in the second sentence of Article I(1).

The Convention does not define the term "domestic award." Accordingly, the reference in the second sentence of Article I(1) of the Convention to "arbitral awards not considered as domestic awards," has provided "a complex

interpretive challenge to the courts in this country." *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, 2000 U.S. Dist. LEXIS 8498, Nos. 3:95CV2362 AWT, 3:96CV2218 AWT, 3:96CV2219 AWT, 2000 WL 435566 at *4 (D. Conn. Mar. 14, 2000).

Jacada contends that this Court should look to traditional principles of Anglo-American conflicts of law for the meaning of "domestic award." According to these principles the law of the place of the award determines whether the award is valid, and an arbitral award made and sought to be enforced in the United States would be a domestic award. *See Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 482 (7th Cir. 1997) (citing *Restatement (Second) of Conflicts of Law*, § 220, comment c (1971)).

Although the Seventh Circuit in *Lander* referenced the traditional interpretation of "domestic award," it did not agree with Jacada's assertion that the traditional interpretation should govern the applicability of the Convention to an arbitral award rendered in the United States. Instead, the Seventh Circuit followed the Second Circuit's determination in *Bergesen* that Congress gave meaning to the term "domestic award" in the implementing legislation:

> Inasmuch as it was apparently left to each state to define which awards were to be considered nondomestic . . . Congress spelled out its definition of that concept in section 202.

710 F.2d at 933.

Section 202 of Title 9 of the United States Code, broadly defines "nondomestic" awards to include all except a small

class of awards that do not involve foreign citizens or have a relationship with a foreign country:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title [9 USCS § 2], falls under the Convention. **An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.** For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202 (emphasis added). According to the Second Circuit, this section was intended to ensure that "an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in [United States] courts unless it has a reasonable relation with a foreign state." *Bergesen*, 710 F.2d at 933 (quoting H.R. Rep. No. 91-1181, 91st Cong., 2d Sess. (1970) 2, reprinted in 1970 U.S. Code Cong. & Admin. News 3601, 3602). The Second Circuit also adopted the view that awards "not considered as domestic" applies to "awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." *Bergesen*, 710 F.2d at 932. Stated differently,

the second sentence of Article I(1), as supplemented by 9 U.S.C. § 202, applies to those arbitral awards made in the United States which arise from a commercial relationship with some significant foreign nexus. *Coutinho Caro*, 2000 U.S. Dist. LEXIS 8498, 2000 WL 435566 at *4.

Bergesen's broad interpretation of the scope of the Convention has been widely followed. *See, e.g., Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte*, 141 F.3d 1434, 1441 (11th Cir. 1998) (joining the First, Second, Seventh, and Ninth Circuit in their interpretation of awards "not considered as domestic"); *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995) ("Chapter 2 mandates that any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention."); *Ministry of Def. of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989) (holding that Convention applies when award arises out of legal relationship which is commercial in nature and is not entirely domestic in scope); *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 293 (S.D. Tex. 1997) (following *Bergesen*). *See also Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982) (holding that commercial agreement where one party is not an American citizen is subject to section 202).

The relationship between the parties in this case concerns performance abroad. The object of the Distribution Agreement was for the marketing and distribution of computer software throughout Europe, the Middle East, and Africa. The entire sales and marketing territory under the contract is outside the United States. No part of the contract was to be performed in the United States. Moreover, one of the parties is not an American citizen, the contract was signed

abroad, and the alleged breach took place outside the United States. Thus, under *Bergesen* and its progeny, the arbitral award at issue in this case clearly falls under the Convention.

Jacada contends that *Bergesen* was wrongly decided and should not be followed by this Court. Jacada's contention is not supported by any case law and does not provide a convincing basis for ignoring the opinions of all of the circuit courts that have considered the issue. This Court is constrained to apply the *Bergesen* line of cases and accordingly finds that the arbitral award at issue in this case is governed by the Convention.

IV.

Review of arbitral awards under the Convention is governed by the limitations contained in Article V of the Convention. *See* 9 U.S.C. § 207 ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."). Article V provides that recognition and enforcement of an arbitral award may be refused, at the request of the party against whom it is invoked, only under specific enumerated conditions. As the Sixth Circuit noted in *M & C Corp v. Erwin Behr*, 87 F.3d 844 (6th Cir. 1996), "Article V of the Convention lists the **exclusive grounds** justifying refusal to recognize an arbitral award." *Id.* at 851 (emphasis added). *See also Indus. Risk*, 141 F.3d at 1446 ("In short, the Convention's enumeration of defenses is exclusive.").

According to IMS, the only applicable provision of Article V limits this Court's review to whether enforcement would be contrary to U.S. public policy. Convention, Article V (2)(b). IMS's recitation of the applicable standard of review ignores

Article V(1)(e) of the Convention and Jacada's argument under that section. As Jacada points out, Article V(1)(e) provides that recognition and enforcement of the award may be refused if the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

In *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19-21 (2d Cir. 1997), the Second Circuit confirmed that Article V(1)(e) of the Convention allows a court in the country under whose law the arbitration was conducted to apply its domestic arbitral law to a motion to set aside or vacate that arbitral award. *Id.* at 21. "There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law." *Id.* at 22. Rather, "the Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Id.* at 23 (citing Convention, art. V(1)(e)).

Because Jacada has moved to set aside or vacate an arbitral award entered in the United States, this Court may apply its domestic arbitral law to set aside or vacate that arbitral award. Jacada contends that the applicable domestic arbitral law is the law of Michigan because the arbitral award was entered in Michigan and the parties agreed that their agreement would be governed by the law of Michigan.

This Court disagrees with Jacada's assertion that review of the arbitral award will be governed by the law of Michigan. In *Yusuf*, the Second Circuit noted that in the case of the United States, the domestic procedural arbitral law is

the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. *Yusuf*, 126 F.3d at 20-21. *See also M & C*, 87 F.3d at 849 (concluding that it could not apply the FAA's implied grounds for vacatur because the United States did not provide the law of the arbitration for purposes of Article V(1)(e)); *Lander*, 107 F.3d at 478 (noting that Article V(1)(e) of the Convention contemplates the possibility of the award's being set aside in a proceeding under local law).

Although the parties in this case indicated generally that their agreement was to be governed by Michigan law, the parties did not specify the standards under which an arbitral award would be reviewed. There is no question that because the parties' written agreement to arbitrate is part of a "contract evidencing a transaction involving commerce," it falls within the scope of the FAA. *See* 9 U.S.C. § 2. The FAA was enacted to provide for enforcement of privately entered agreements to arbitrate. *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 932 (6th Cir. 1998) (citing *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 53-54, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995)). "Arbitration under the Act [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Ferro Corp.*, 142 F.3d at 934 (quoting *Volt Info.Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). However, a general state choice-of-law clause appended to a contract that also includes an arbitration provision does not preclude application of the FAA in a federal court proceeding. *Ferro Corp.*, 142 F.3d at 938. *See also UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) ("We will not interpret an arbitration agreement as precluding the application of the FAA unless the parties' intent that the agreement be so construed is

abundantly clear."). As the Sixth Circuit noted in *Ferro Corp.*:

> Most contracts include a choice-of-law clause, and, thus, if each of these clauses were read to foreclose the application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases. Such an interpretation of the FAA is simply not viable, as it would effectively emaciate the Act itself.

142 F.3d at 938. *See also Roadway Pckage Sys., Inc. v. Scott Kayser*, 257 F.3d 287, 289 (3rd Cir. 2001), *cert. denied*, 534 U.S. 1020, 122 S. Ct. 545, 151 L. Ed. 2d 423 (2001) (holding that "a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default regime.").

Where the FAA and state law governing arbitration agreements conflict, the state law is preempted. *Ferro Corp.*, 142 F.3d at 935. *See also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996) (state law not consonant with FAA is preempted by FAA). The FAA specifies the grounds under which an arbitral award may be vacated. 9 U.S.C. § 10. Under Michigan law, a court has broad powers to vacate an award, including to the power to vacate an award if the arbitrator exceeded his or her powers. M.C.R. 3.602(J)(1)(c). Although the FAA is substantially the same as the Michigan court rule governing review of arbitral awards, review of arbitral awards provided under the FAA is more limited than the review available under Michigan law. *Detroit Auto Inter-Ins. Exch. v. Gavin*, 416 Mich. 407, 444-45, 331 N.W.2d 418 & n.11, 416 Mich. 407, 331 N.W.2d 418 (1982). Because the parties in this case did not specify in their

agreement that review of the arbitral award would be governed by state law, and because federal and state law conflict, the review will be governed by federal law.

For the reasons stated above, this Court concludes that this action is governed by the Convention, and consistent with the Convention, the Court will review Jacada's motion to set aside or vacate the arbitral award under the provisions of Chapters 1 and 2 of the FAA.

Date: March 31, 2003

/s/ _____
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that upon consideration of the parties' briefs as to the appropriate standard of review of the arbitral award (Docket #'s 27, 29, 32, 33), the Court shall review the arbitral award at issue under the standards articulated in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the provisions of Chapters 1 and 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 and 201-208.

Date: March 31, 2003

/s/_____
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:02-CV-479
File No. 1:02-CV-78

[Filed October 22, 2003]

JACADA (EUROPE), LTD., f/k/a CLIENT/SERVER TECHNOLOGY (EUROPE), LTD., Plaintiff,	)
v.	)
INTERNATIONAL MARKETING STRATEGIES, INC., Defendant.	)

HON. ROBERT HOLMES BELL

OPINION

These consolidated actions, one to vacate an arbitral award, and one to enforce the same arbitral award, are currently before the Court on the parties' cross-motions for

summary judgment and on a motion for suitable security. For the reasons that follow the arbitration award will be upheld.

I.

Jacada (Europe) Ltd., formerly known as Client/Server Technology (Europe), Ltd. (hereinafter "CST") is a software developer incorporated in the United Kingdom. International Marketing Strategies (hereinafter "IMS") is a Michigan corporation.

CST created certain software known as Jacada/400 (the "Product"). On May 2, 1997, CST entered into a Distribution Agreement ("Agreement") with IMS whereby IMS obtained the exclusive right to market and distribute the Product throughout Europe, the Middle East, and Africa. The Agreement provided that CST would provide IMS with a master copy of the Product which IMS could duplicate and sell. When IMS contracted to sell the Product to a customer, IMS would pay a fee to CST to obtain the license and the activation key to enable the Product. (Agreement at ¶ 6).

During the term of the Distribution Agreement, a dispute arose over its interpretation and application to a particular sale of the Product to a customer known as JBA. CST refused to pay IMS a commission for its efforts in procuring the sale to JBA. IMS initiated an arbitration proceeding before the American Arbitration Association for breach of contract. The arbitrators conducted over 5 days of hearings and took testimony from 10 witnesses.

On April 3, 2001, the arbitrators issued their award in favor of IMS. The arbitrators found that the Product was covered by the Distribution Agreement, that IMS had the exclusive right to sell the Product to JBA, and that IMS was

the procuring cause of CST's contract with JBA. The arbitrators determined that because of the exclusivity provision in the Agreement, CST had no right to step in and conclude the negotiations with JBA without compensating IMS. The arbitrators awarded IMS $401,299.00 to be paid within thirty days from the date of the award, and fifty percent of nine remaining payments of £203,033 (pounds sterling) to be paid in periodic payments through February 1, 2003. Thereafter, CST filed a complaint in the Circuit Court for the County of Oakland to vacate the arbitral award and IMS filed a complaint in this Court to enforce the arbitral award. The two actions were ultimately consolidated in this Court.

On March 31, 2003, this Court issued an opinion and order holding that the arbitral award would be reviewed under the standards articulated in the New York Convention on the Recognition and Enforcement of Arbitral Awards and the provisions of Chapters 1 and 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1-16 and 201-208.

II.

IMS contends that CST's motion to vacate is untimely. (IMS Br. in Opp'n to Mot. to Vacate).

The FAA provides that "[n]otice of a motion to vacate... an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. The arbitrators' award was rendered on April 3, 2001. CST filed its action in state court to vacate the arbitration award under Michigan law on April 24, 2001. However, CST did not file its motion in this Court to vacate the award until April 21, 2003. IMS contends that because CST's motion to vacate was filed over two years after

the arbitration award was filed, it is well outside the FAA's limitations period and is accordingly barred.

IMS's argument on this point elevates form over substance. Section 12 of the FAA requires that notice of a motion to vacate be filed within the three month period. Although CST did not file its motion to vacate until April 2003, it filed an action to vacate the award within 21 days of the award. CST accordingly placed IMS on notice within the three month limitations period that CST was attempting to have the award vacated. Because there was a dispute between the parties as to whether state or federal law applied, this Court will construe CST's complaint in the Oakland Circuit Court to vacate the arbitration award as either satisfying or tolling the limitations period under the FAA. *But see Sanders-Midwest. Inc. v. Midwest Pipe Fabricators, Inc.*, 857 F.2d 1235, 1238 (8th Cir. 1988) (holding that filing of application to vacate in state court within 3 month period did not satisfy § 12 service of notice).

In the alternative, the Court finds that CST has waived its right to challenge the timeliness of IMS' motion to vacate. The time bar in § 12 of the FAA is "in the nature of a statute of limitations, which is subject to waiver." *Foster v. Turley*, 808 F.2d 38, 41 (10th Cir. 1986). IMS did not raise the statute of limitations as an affirmative defense in either its answer to CST's state court complaint or in its response to CST's counterclaim in the federal case. IMS's failure to invoke the filing requirement in a timely manner constitutes a waiver of its applicability to CST's motion to vacate. *See Foster*, 808 F.2d at 41.

Accordingly, the Court denies IMS's argument that CST's motion to vacate should be dismissed as untimely.

III.

The Court turns to the parties' cross-motions to vacate and to enforce the arbitration award. The FAA provides that a court may vacate an arbitration award in the following situations: (1) where the award was procured by fraud, (2) where the arbitrators were evidently partial or corrupt, (3) where the arbitrators misbehaved so that a party's rights were prejudiced, or (4) where the arbitrators exceeded their powers or executed them so that a final, definite award was not made. *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) (citing 9 U.S.C. § 10(a)). In addition, a reviewing court may vacate an award where the arbitrators have manifestly disregarded the law. *Id.*

CST moves to vacate the award on the basis that the arbitrators exceeded their powers and manifestly disregarded the law by refusing to enforce the limitation of damages provision contained in the parties' Agreement.[1] The standard for reviewing the decisions of arbitrators is highly deferential. *Eisenmann Corp. v. Sheet Metal Workers Int'l Ass'n Local No. 24*, 323 F.3d 375, 380 (6th Cir. 2003). "[C]ourts must accord an arbitrator's decision substantial deference because it is the arbitrator's construction of the agreement, not the court's construction, to which the parties have agreed." *Beacon Journal Pub. Co. v. Akron Newspaper Guild, Local Number* 7, 114 F.3d 596, 599 (6th Cir. 1997). "[I]f an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a

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[1] Although CST also disagrees with the finding of liability, this is not the basis of its motion to vacate. (CST Br. in Supp. of Mot. to Vacate at 5).

court is convinced he committed serious error does not suffice to overturn his decision." *Eisenmann*, 323 F.3d at 380 (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (internal quotations omitted)).

Federal courts may not overturn arbitration awards as long as the arbitrator's award "draws its essence" from the parties' agreement, and is not merely the arbitrator's "own brand of industrial justice." *Eisenmann*, 323 F.3d at 380 (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987)). The Sixth Circuit has identified four ways by which an arbitrator may stray from the "essence" of the parties' agreement:

> an arbitration award may be declared invalid and vacated if "(1) it conflicts with express terms of the agreement; (2) it imposes additional requirements not expressly provided for in the agreement; (3) it is not rationally supported by or derived from the agreement; or (4) it is based on general considerations of fairness and equity instead of the exact terms of the agreement."

Eisenmann, 323 F.3d at 380 (quoting *Int'l Union, UAW v. Dana Corp.*, 278 F.3d 548, 554 (6th Cir. 2002)).

Courts may also upset an arbitration award if it is rendered in "manifest disregard of the law." *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995); *Eastern Associated Coal Corp. v. United Mine Workers of Amer., Dist. 17*, 531 U.S. 57, 62 (2000)). The Sixth Circuit has emphasized that manifest disregard of the law is a very narrow standard of review:

> A mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established legal precedent. When faced with questions of law, an arbitration panel does not act in manifest disregard of the law unless (41) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.

Merrill Lynch, 70 F.3d at 421 (citations omitted). "Thus, to find manifest disregard a court must find two things: the relevant law must be clearly defined and the arbitrator must have consciously chosen not to apply it." *Dawahare*, 210 F.3d at 669.

The limitation of damages provision in the parties' Agreement provides:

> Notwithstanding anything herein to the contrary, the maximum aggregate amount of money damages for which CST may be liable to IMS under this Agreement, resulting from any cause whatsoever other than for a breach by CST of any of its representations and warranties under paragraph 5(a), shall be limited to the amounts actually paid by IMS to CST under this Agreement.

(Agreement at ¶ 10(b)).

The arbitrators refused to apply the limitation of damages provision. They noted that the potential effect of the provision was to "unreasonably and unconscionably exclude damages for a large breach of the Agreement while permitting damages for a small breach of contract." (Arb. Award at 3). As an example, the arbitrators noted that if IMS had only made sales

of $1,000 to customers prior to landing a large sale of $200,000 to a new customer, CST would be able to limit its damages under a breach of contract claim for the $200,000 sale to 50% of the $1,000 in sales previously made by IMS. *Id.* "The arbitrators find this limitation of damages clause in the Agreement to be unreasonable and unconscionable and find that it fails of its essential purpose. Consequently, the limitation of damages clause will be disregarded." *Id.*

CST contends that the arbitrators' award should be vacated because the arbitrators abandoned both the contract and the law. CST contends that the arbitrators' decision to disregard contract language did not draw its essence from the collective bargaining agreement. CST notes that the arbitrators found no ambiguity in the limitations provision. They understood how the limitations provision would operate. According to CST, the arbitrators simply chose not to apply this provision and instead exercised their own sense of "fair play" to make a different contract for the parties. In other words, CST argues, they applied their "own brand of industrial justice."

The Court is satisfied that arbitrators' award does in fact "draw its essence" from the contract. The Agreement provides in relevant part:

> So long as IMS has the EXCLUSIVE RIGHT to Direct market JACADA/400, CST hereby retains no right to Direct Market JACADA/400 in the Territory during the term of this Agreement. IMS agrees to use its best efforts to Direct Market the JACADA Products during the term of this Agreement.

(Agreement at ¶ 1 (a)).

Although the arbitrators' explicitly disregarded the limitation of damages provision, this is not a case where the arbitrators simply redrafted the Agreement according to their own sense of fairness. It is evident from a review of the arbitrators' award that they disregarded the limitation of damages provision in order to give effect to IMS' exclusive distribution rights and duties under the Agreement. The arbitrators found that IMS was the procuring cause of the sale to JBA and that IMS would likely have completed the sale to JBA had CST not asked IMS to step aside. (Arb. Award at 2). That finding is not being challenged by CST. Had the arbitrators applied the limitation of damages provision to a breach of the exclusivity provision, IMS would receive no consideration for undertaking its contractual obligation of using its best efforts to market and distribute the Product and it would have no remedy if CST jumped in at the last minute, as it did here, to take the contract from IMS.

There was also evidence in the record from which the Arbitrators could find that the limitation provision was intended to apply to failures of the Product to conform to its intended purpose, rather than to a breach of the exclusivity provision. (Roark-Peters testimony, Arb. Tr. Vol. I at 128-29). According to IMS employee Janice Roark-Peters the parties never contemplated that the limitations provision would apply to CST's breach of the exclusive right to distribute the Product because such an application would result in absolutely no remedy at all to IMS. CST introduced no contradictory evidence regarding the intent of the parties.

In ignoring the limitation of damages clause the arbitrators were clearly attempting to give effect to the essential terms of the contract and the intent of the parties. Accordingly, the Court is satisfied that their disregard of the limitation of damages provision drew its essence from the contract.

CST also contends that the arbitrators' award was in manifest disregard of the law. As noted above, this is a very narrow standard of review. *Merrill Lynch,* 70 F.3d at 421.

> If a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.

Id. The arbitrators in this case attempted to explain their award by reference to the legal theories of unconscionability and failure of essential purpose. This Court's task, then, is simply to determine whether their application of these theories was legally plausible under the circumstances of this case.

CST contends that unconscionability was not a proper legal basis for the arbitrators' decision because it was not argued to the arbitrators. CST has not directed the Court's attention to any rule that would prohibit the arbitrators from making a finding of unconscionability unless that legal theory was specifically raised by the parties to the arbitration. Moreover, it would not be reasonable to apply such a rule where, as here, the legal theory of unconscionability is closely related to the theory of failure of essential purpose that was relied on at arbitration.

CST also contends that the arbitrators manifestly disregarded the law in relying on the legal theory of unconscionability because unconscionability is rarely found in the commercial context and this is not a case where there was a great disparity in the bargaining power of the parties.

Under Michigan law a contractual agreement to limit damages will be upheld unless it is deemed "unconscionable."

WXON-TV, Inc. v. A. C. Nielsen Co., 740 F. Supp. 1261, 1264 (E.D. Mich. 1990). *See also St. Luke's Hosp. v. SMS Computer Sys., Inc.*, Nos. 92-1205, 92-1206, 1993 WL 188457 (6th Cir. June 1, 1993) (unpublished) (noting that the law provides that "damage limitations clauses are enforceable unless shown to be unconscionable or shown to fail of their essential purpose."). Michigan courts apply a two-prong test for determining whether a contractual provision is unconscionable. The first prong, which addresses procedural unconscionability, asks "What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?" *WXON-TV*, 740 F. Supp. at 1264 (quoting *Allen v. Mich. Bell Telephone Co.*, 18 Mich. App. 632, 171 N.W.2d 689 (1969)). The second prong, which addresses substantive unconscionability, asks "Is the challenged term substantively reasonable?" *Id.* "Most courts take a 'balancing approach' to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability." *Citizens Ins. Co. v. Proctor & Schwartz*, 802 F. Supp. 133, 144 (W.D. Mich. 1992) (McKeague, J.). The party seeking to invalidate the provision must show both types of unconscionability. *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 322 (6th Cir. 1998).

"Unconscionability rarely exists in a commercial setting involving parties of equal bargaining power." *U. S. Fibres, Inc. v. Proctor & Schwartz, Inc.*, 509 F.2d 1043, 1048 (6th Cir. 1975). "The law presumes that business people are fully competent to enter into contracts and obligate themselves to perform in any manner they wish. The courts have no authority to rewrite the terms of a contract because they might feel that it was an unwise agreement for a party to have entered into." *WXON*, 740 F. Supp. at 1264 (citation

omitted). "However, where the remedy prescribed in a limitation of liability clause is necessarily illusory, failing of its essential purpose, the clause may be held unconscionable." *Citizens*, 802 F. Supp. at 143 (citing *Latimer v. William Mueller & Son, Inc.*, 149 Mich. App. 620, 637, 386 N.W.2d 618 (1986)).

The case law illustrates that even though a finding of unconscionability in the commercial context is rare, it is not prohibited. The arbitrators in this case determined that the limitations provision was unreasonable and unconscionable when it was applied to a breach of the exclusivity clause. Although the arbitrators' determination is not supported by separate findings on the two prongs of the test for unconscionability, their finding is broad enough to include both procedural and substantive unconscionability. The arbitrators clearly had a factual basis for their finding that the limitations provision was not substantively reasonable when applied to CST's breach of IMS's exclusive distribution rights. There was also evidence presented at arbitration from which the arbitrators could find procedural unconscionability. Evidence was presented that IMS had only 5 employees and was operating out of Tony Shearing's house, and CST was the only source of this Product. (Roark-Peters testimony, Tr. Vol. I at 79, 91-92; Timor dep. at 49). Based upon this evidence the arbitrators could have found that CST had greater economic strength and bargaining power than/MS. While this Court may not have found unconscionability under the facts presented, this Court cannot say that the arbitrators' finding was not legally plausible or that it was entered in "manifest disregard of the law."

CST contends that the arbitrators' determination that the limitation of damages provision failed of its essential purpose also constitutes a manifest disregard of the law. The Uniform

Commercial Code ("UCC") provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act." M.C.L. § 440.2719(2). CST contends that IMS's description of the Agreement as a distributorship agreement, and its statement that the money received resembled sales commissions, (IMS Closing Arg. at 59), constituted an admission that the contract involved services, not the sale of goods, and that it was accordingly not governed by the UCC or its "failure of essential purpose" doctrine.

The Agreement governing the parties' relationship in this case grants IMS the exclusive right to direct market the Product. (Agreement at ¶ 1). The Agreement provides that CST will provide IMS with a master copy of the Product; that IMS may duplicate, market, sell and distribute licensed copies of the Product; and that IMS will remit payment to CST for each license sold. (Agreement at ¶ 6). The arbitrators could reasonably interpret this Agreement as a hybrid contract for services and for the sale of goods that was covered by the UCC. *See Central On Line Data Systems, Inc. v. Filenet Corp.*, Nos. 95-1016/54, 1996 U.S. App. LEXIS 25261 (6th Cir. August 23, 1996) (applying UCC principles to a hybrid sales and services contract to design and install computer imaging system). Moreover, the case law does not strictly limit the application of the "failure of an essential purpose" to cases involving the sale of goods. For example, in *Networktwo Communications Group, Inc. v. Spring Valley Marketing Group and Communityisp, Inc.* 2003 WL 1119763, *4 (E.D. Mich. 2003), the court held that the damage limitation provisions in a contract for services did not fail of their essential purpose. Accordingly, even if the arbitrators were incorrect in applying UCC law to this Agreement, the mistake cannot be deemed to "fly in the face of clearly established legal precedent." *Merrill Lynch,* 70 F.3d at 421.

The official comments to UCC § 2-719 provide that "under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article." M.C.L.A. § 440.2719 (Official Comments). There were sufficient facts presented from which the arbitrators could reasonably find that the limitation of damages provision, as applied to a breach of the exclusivity provision, operated to deprive IMS of the substantial value of its bargain. There was a plausible basis for the arbitrators' finding that the limitation provision failed of its essential purpose.

The Court is not unsympathetic to CST's arguments. Nevertheless, upon review, this Court concludes that there was sufficient evidence and a plausible legal basis which would permit the arbitrators to find that the limitation provision was unconscionable and failed of its essential purpose. Based upon this conclusion and in view of this Court's limited and deferential review of arbitrator awards, this Court is constrained to deny CST's motion to vacate the award and to uphold and enforce the arbitration award.

IV.

CST contends that the arbitration award must also be vacated because it was not for a definite sum, but instead included future payments over time. The FAA provides that an arbitration award may be vacated if it is not final and definite. 9 U.S.C. § 10(a)(4). The arbitration award contains both a set sum and a requirement that future payments be made over time:

> IMS is further awarded 50% of the future quarterly payments to be made by JBA to CST under the payment formula in the CST/JBA contract (208,333 Pounds Sterling due on...) as and when such payments are received by CST at the prevailing exchange rate published in the Wall Street Journal for the dates on which CST actually receives the funds from JBA.

(Arb. Award at 4, ¶ 2).

In *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273 (7th Cir. 1973), the Seventh Circuit held that an award was final, definite and enforceable even though it included commissions on future sales because the arbitrator had resolved all claims before him and left to the district court only the ministerial computation of the amount owed, a computation that was easily ascertainable from the documents. *Id.* at 280. *See also Lummus Global Amazonas S.A. v. Aguaytia Energy del Peru S.R. Ltda.*, 256 F. Supp.2d 594, 641 (S.D. Tex. 2002) ("If an arbitrator is able to specify a formula for amounts of future damages that settles the dispute between the parties and does not leave questions unresolved for further litigation, courts will uphold the award.").

Contrary to CST's arguments, the future payments in this case are sufficiently definite because nothing is left to this Court to figure out beyond a ministerial application of the exchange rate. Accordingly, CST's motion to vacate the award on the basis that it was not definite will be denied.

V.

IMS has filed a motion for an order requiring CST to provide suitable security as permitted by Article VI of the New York Convention. In support of this motion IMS notes

that the award was entered in 2001 and if it is enforced, CST will owe IMS more than $1.8 million.

The New York Convention gives the court discretion to order suitable security:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

9 U.S.C. § 201, Art.VI (emphasis added).

In *Lummus* the court denied security where there was no state law requirement for security and where the record was insufficient to show the need or justification for security. 256 F. Supp.2d at 649. IMS has not given any information tending to show that CST will not be able to pay the award. Moreover, the New York Convention's security provision is generally applied where the proceeding to vacate and the proceeding to enforce are in two different jurisdictions and security is sought in conjunction with an application to adjourn the decision on enforcement. *See Spier v. Calzaturificio Tecnica,* No. 86 CIV. 3447 1988 WL 96839 (S.D.N.Y. Sept. 12, 1988) (unpublished). That is not the posture of this case. Accordingly, IMS's motion for security will be denied.

An order and judgment consistent with this opinion will be entered.

Dated: October 21, 2003

/s/_____
Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION

Case No. 50-T-117-00327-99

[April 3, 2001]

In the Matter of	)
	)
International Marketing Strategies, Inc.,	)
Claimant and Counter-Respondent	)
	)
v.	)
	)
JACADA (Europe), Ltd. f/k/a	)
Client/Server Technology (Europe), Ltd.	)
Respondent and Counter-Claimant.	)
	)

Award of the Arbitrators

We, the undersigned Arbitrators, having been designated in accordance with the arbitration agreement entered into between the above-named Parties and dated May 2, 1997, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby award as follows:

This is a case in which International Marketing Strategies, Inc. ("IMS") entered into a Distribution Agreement (the "Agreement") with Jacada (Europe), Ltd. f/k/a referred to in

the Agreement as JACADA/400. For a period of two years from May 2, 1997, IMS had the exclusive right to distribute the lite version of the product referred to as JACADA/400 and a non-exclusive right to distribute the professional version of JACADA/400. There was conflicting evidence introduced at the hearing as to whether JACADA/400 included the CST products then known as GUISys, VBSys and Jacada for Java. Based upon the arbitrators' review of the evidence and the demeanor of the witnesses at the hearing, the arbitrators find that JACADA/400 included all three of the CST products then known as GUISys, VBSys and Jacada for Java for purposes of the Agreement (exclusive as to the lite versions and non-exclusive as to the professional versions).

After execution of the Agreement, IMS embarked upon an effort to introduce CST's products to IMS' channel and sell CST's products to Value Added Resellers in its channel. IMS was successful in licensing CST's products to a company known as Westcoast. IMS invoiced Westcoast for the license fees and, in turn, remitted 50% of the license fees received from Westcoast to CST under the terms of the Agreement. Afterwards, IMS built upon the Westcoast sale of JACADA/400 to interest another prospect, JBA, in CST's products. JBA was a large Independent Software Developer ("ISV") as well as a large Value Added Reseller ("VAR"). There was conflicting evidence introduced at the hearing as to whether JBA was or was not a customer contemplated by the Agreement since the Agreement does not list ISVs as targeted customers. Based upon the arbitrators' review of the evidence and the demeanor of the witnesses at the hearing, the arbitrators find that JBA, as a VAR, was a customer contemplated by the Agreement even though JBA was also an ISV.

IMS was attempting to sell CST's products to JBA to update its System 21 software over a lengthy period of time. IMS' efforts were promising primarily based upon its prior successful licensing of the JACADA/400 product to Westcoast. The evidence introduced at the hearing indicated that CST was also attempting to interest JBA in its products independently of IMS. However, the arbitrators find, based upon the evidence introduced at the hearing and the demeanor of the witnesses, that CST's efforts were less effective than IMS' efforts.

Since JBA was both a large VAR and a large ISV, CST had a strong interest in a prospective sale to JBA. Consequently, CST's then president, Ofer Timor, testified in a deposition: "I toid Tony [Shearing] CST would take over from the first time he introduce us. I never expected Tony to be involved in any of the sale, and I think he did an excellent job introducing us to JBA." Dep of Timor at p 19. Tony Shearing, the president of IMS, essentially testified that Mr. Timor asked him to step aside so the CST could continue the sales effort which IMS had begun. Mr. Timor also testified in his deposition that he "...said [to Mr. Shearing] I will take care of you." Dep of Timor at p 41.

The evidence demonstrated that there was a very substantial effort undertaken by CST to conclude the sale to JBA (at CST's expense). Eventually a sale of CST's products was consummated. Based upon the arbitrators' review of the evidence and the demeanor of the witnesses at the hearing, the arbitrators find that IMS was the procuring cause of the sale of CST's products to JBA and that IMS would likely have completed the sale to JBA had CST not asked IMS to step aside. An effort solely by IMS to sell JBA would necessarily have required substantial involvement of CST since JBA essentially would require significant proof of concept,

technical assistance and reassurance of CST's viability from CST as the manufacturer of the product. However, the Agreement contemplated that IMS could essentially "purchase" that involvement from CST. In that regard, the evidence tendered by IMS indicated that CST incurred approximately 319, 376 Pounds Sterling to support the sale to JBA. In contrast, the evidence tendered by CST indicated that CST incurred approximately $1,110,000 USD to support and conclude the sale to JBA. This amount is comprised of approximately $240,000 USD for Mr. Nuni's services over a period of six months, approximately $710,000 USD for the services of three technical persons (90% of their time) over a period of 15 months, approximately $60,000 USD for the services of Mr. Coggrave (80% of his time), and approximately $100,000 USD in attorney fees to negotiate the written contract with JBA. The evidence tendered with respect to CST's costs associated with supporting and concluding the sale to JBA coupled with the arbitrators' observation of the demeanor of the witnesses permitted the arbitrators to conclude that the evidence of such costs presented by CST was more credible than the evidence of such costs presented by IMS.

There was conflicting evidence introduced at the hearing as to whether those types of pre-sale costs were contemplated to be borne equally by the parties or were contemplated to be borne by IMS alone. Based upon the arbitrators' review of the evidence and the demeanor of the witnesses at the hearing, the arbitrators find that the cost of supporting and concluding the sale to JBA is an obligation of IMS alone. Consequently, any amount due IMS as a result of the sale of CST's products to JBA must be reduced by the $1,110,000 USD which CST incurred to support and conclude the sale to JBA.

The contract between CST and JBA provides for a series of license payments to be made by JBA to CST totaling 4,000,000 Pounds Sterling. The payments were to be made with an initial down payment of 1,500,000 Pounds Sterling and twelve quarterly payments of 208,333 Pounds Sterling on May 15, 2000, August 1, 2000, November 1, 2000, February 1, 2001, May 1, 2001, August 1, 2001, November 1, 2001, February 1, 2002, May 1, 2002, August 1, 2002, November 1, 2002, and February 1, 2003. Based upon the arbitrators' review of the evidence and the demeanor of the witnesses at the hearing, the arbitrators find that the course of dealing between the parties under the Agreement established that 50% of the license fees paid by a customer to IMS would in turn be paid to CST. Applying the course of dealings between the parties to the JBA sale, the arbitrators find that IMS is entitled to 50% of the 4,000,000 Pounds Sterling stream of payments (less the $1,110,000 USD which CST incurred to support and conclude the sale to JBA).

The Agreement contains a limitation of damages clause which would reduce the maximum amount of any damages claimed by IMS "to the amounts actually paid by IMS to CST under this Agreement." Agreement at paragraph 10(b). Evidence introduced at the hearing established this amount to be approximately $125,937.91 USD. The potential effect of the limitation of damages clause is to unreasonable and unconscionably exclude damages for a large breach of the Agreement while permitting damages for a small breach of contract. For example, if IMS had made only sales of e.g., $1,000 to customers and then landed a large sale of e.g., $200,000 to a new customer, CST would be able to limit its damages under a breach on contract claim for the $200,000 sale to 50% of $1,000 sales previously made by IMS. The arbitrators find this limitation of damages clause in the Agreement to be unreasonable and unconscionable and find

that it fails of its essential purpose. Consequently, the limitation of damages clause will be disregarded.

Finally, CST has a Counterclaim against IMS for unpaid invoices owed by IMS to CST. At the hearing, IMS was given the opportunity to cor e forward with evidence of payment of these invoices. No credible evidence of payment has been tendered to the arbitrators either at the hearing or in the post-hearing Briefs. Based upon a review of the evidence and the demeanor of the witnesses at the hearing, the arbitrators find that IMS owes CST the sum of $35,300.11 USD for unpaid invoices.

Since this award is to be entered in U.S. Dollars, the arbitrators will exercise their discretion and convert the amounts paid by JBA to CST prior to the conclusion of the hearing to U.S. Dollars at the prevailing exchange rate on November 17, 2000 (the final date on which testimony was given at the hearing) published in the November 20, 2000 issue of the Wall Street Journal regardless of the dates that JBA made the payments to CST. The exchange rate on November 17, 200 was: $1.4224 USD=1 Pound Sterling. With respect to future payments that will be made by JBA to CST, the exchange rate to be applied will be the rate published in the Wall Street Journal for the date that CST receives payment from JBA.

1) With respect to the Counter-claimant's claim in the Counterclaim, CST is awarded the sum of $35,300.11 USD. Within 30-days from the date fo transmittal of this Award to the Parties, IMS shall pay to CST, the sum of $35,300.11 USD. Interest at the Michigan statutory rate applicable to State Court judgments shall accrue on the Award to the Counter-claimant beginning 30-days from the date of transmittal of this Award to the Parties.

2) With respect to the Claimant's claim in the Complaint, IMS is awarded the initial sum of $1,511,299 USD (50% fo the Pounds Sterling 2,124,999 payments thus far made by JBA to CST as of the date of the hearing converted to U.S. Dollars using the 1.4224 exchange rate) less the sum of $1,100,000 USD which CST incurred to support and conclude the sale to JBA. Thus, the initial award in favor of IMS is in the amount of $401,299 USD. Within 30-days from the date of transmittal of this Award to the Parties, CST shall pay to IMS, the sum of $401,299 USD.

The evidence introduced at the hearing established a schedule for JBA to pay CST. The initial down payment of 1,500,000 Pounds Sterling and three quarterly payments of 208,333 Pounds Sterling apiece had been paid by the time of the hearing, and are accounted for in the initial award set forth above. The remaining payments are due quarterly. The February 1, 2001 quarterly payment my well have been paid by the date of this Award. However, the arbitrators are not aware of whether CST has actually received that payment.

IMS is further awarded 50% of the future quarterly payments to be made by JBA to CST under the payment formula in the CST/JBA contract (208,333 Pounds Sterling due on February 1, 2001, May 1, 2001, August 1, 2001, November 1, 2001, February 1, 2002, May 1, 2002, August 1, 2002, November 1, 2002, and February 1, 20030 as and when such payments are received by CST at the prevailing exchange rate published in the Wall Street Journal for the dates on which CST actually receives the funds from JBA.

3) The administrative fees and expenses of the American Arbitration Association totaling $20,624.55 shall be borne equally by the Parties.

4) The compensation and expenses of the arbitrators totaling $34,323.23 shall be borne equally by the Parties.

5) This Award is in full settlement of all claims and counterclaims submitted to this Arbitration.

We hereby certify that for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Southfield, Michigan, USA.

State of Michigan)
) ss.:
County of Oakland)

I, Steven L. Schwartz, do hereby affirm upon my oath as Arbitrator that I am the individual described in, and who executed, this instrument, which is my Award.

/s/_____
Steven L. Schwartz, Arbitrator
Dated: 03/27/01

State of Michigan)
) ss.:
County of Oakland)

I, David L. Steinberg, do hereby affirm upon my oath as Arbitrator that I am the individual described in, and who executed, this instrument, which is my Award.

/s/_____
David L. Steinberg, Arbitrator
Dated: 03/30/01

State of Michigan)
) ss.:
County of Oakland)

I, Edward M. Kalinka, do hereby affirm upon my oath as Arbitrator that I am the individual described in, and who executed, this instrument, which is my Award.

/s/_____
Edward M. Kalinka, Arbitrator
Dated: 03/26/01

APPENDIX F

MULTILATERAL

Recognition and Enforcement of Foreign Arbitral Awards [1]

Convention done at New York June 10, 1958; [2]
Accession, with declarations, advised by the Senate of the United States of America October 4, 1968;
Accession, with said declarations, approved by the President of the United States of America September 1, 1970;
Accession of the United States of America, with said declarations, deposited with the Secretary-General of the United Nations September 30, 1970;
Proclaimed by the President of the United States of America December 11, 1970;
Entered into force with respect to the United States of America December 29, 1970.

By the President of the United States of America

A PROCLAMATION

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[1] For note by the Department of State, see p. 2561.

[2] Texts as certified by the Secretary-General of the United Nations.

CONSIDERING THAT:

The Convention of the Recognition and Enforcement of Foreign Arbitral Awards was adopted at New York on June 10, 1958, the text of which is as follows:

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply to the Convention to the recognition and enforcement of awards

made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declarations. [1]

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon,

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[1] For note by the Department of State, see p. 2561.

under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply;

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award i elied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnished to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some

incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [1] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter

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[1] 27 LNTS 157; 92 LNTS 301.

becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, [2] or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into

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[2] TS 993; 59 Stat. 1055.

force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention,

showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition and enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of the Convention to the States contemplated in article VIII.

APPENDIX G

TITLE — ARBITRATION

CHAPTER 2– CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Sec. 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

(Added Pub. L. 91-368, Sec. 1, July 31, 1970, 84 Stat. 692.)

Effective Date

Section 4 of Pub. L. 91-368 provided that: "This Act [enacting this chapter] shall be effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States." The Convention was entered into force for the United States on Dec. 29, 1970.

Sec. 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under

the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Sec. 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Sec. 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Sec. 205. Removal of Cases from State Courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Sec. 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Sec. 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the

arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of Convention.

Sec. 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

APPENDIX H

DISTRIBUTION AGREEMENT

This Agreement dated the 2nd day of May 1997, by and between International Marketing Strategies, Inc., a Michigan Corporation with its principal offices at 1400 Whites Road, Kalamazoo MI 49008 (IMS), and Client/Server Technology (Europe) Ltd., an English company with offices at Ormond House, 26-27 Boswell Street, London, WCIN 3JZ, England (CST).

Preliminary Statement and Certain Definitions

CST has created JACADA/400 (as further described in Exhibit A), a software package for the IBM AS/400 computer. The term JACADA/400 as used herein means the CST JACADA/400 software package (current or developed during the term of this Agreement or any extension or renewal of this Agreement including all documentation, files, and object code) for the IBM AS/400 computer and any fixes, enhancements, and upgrades thereto which are made or developed during the term of this Agreement and made available to CST resellers in general, including, all of the JACADA/400 products described in Exhibit "A" except for the Professional version of JACADA. "Professional Version" means the professional version of Jacada described in Exhibit "A", and JACADA Products" means the JACADA/400 products and the Professional Version.

The parties wish to provide for the grant by CST to IMS of the EXCLUSIVE RIGHT to Direct Market JACADA/400 in

Europe, the Middle East, and Africa (the Territory) and to provide for the grant by CST to IMS of the NON-EXCLUSIVE RIGHT to Direct Market the Professional Version in the Territory.

For the purpose of this Agreement, Direct Market Means: As to the JACADA Products, to market and sell licenses to consumers directly or through any one or more of Value Added Resellers, Direct Mail, Direct/Indirect Sales Representatives, Retail Store Sales, Printed Catalogue Sales, Television, Radio, Infomercial Media, or Telemarketing: PROVIDED, however, that the sale of JACADA Products must not be contingent upon the purchase of any other items, products or services.

1. Direct Marketing Rights

(a) CST hereby grants to IMS the EXCLUSIVE RIGHT (the EXCLUSIVE RIGHT) to Direct Market licensed copies of JACADA/400 in the Territory, and CST hereby grants to IMS the NON-EXCLUSIVE RIGHT to Direct Market licensed copies of the Professional Version in the Territory. So long as IMS has the EXCLUSIVE RIGHT to Direct Market JACADA/400, CST hereby retains no rights to Direct Market JACADA/400 in the Territory during the term of this Agreement. IMS agrees to use its best efforts to Direct Market the JACADA Products during the term of this Agreement.

(b) IMS's shall market the JACADA Products in the Territory under the name JACADA/400. No unauthorized prefixed or postfixed modifiers to the name may be used.

(c) The EXCLUSIVE RIGHT to Direct Market JACADA/400 and the NON-EXCLUSIVE RIGHT to Direct Market the

Professional Version of JACADA shall expire at the end of the term of this Agreement.

(d) Within ten (10) business days after the end of each calendar quarter, IMS' shall provide to CST a report for such quarter which shall include all relevant activities relating to the JACADA Products, which report shall at a minimum include the names of all licensees, the number of licenses sold, and the license fees charged by IMS for the JACADA Products.

2. First Refusal Rights

During the term of this Agreement, in the event that CST Proposes to Direct Market in the Territory through third parties (as such Territory may be amended from time to time pursuant to the terms of this Agreement) any CST developed Internet/Intranet related software packages other than JACADA/400 which are targeted to the AS/400 platform and channel ("New Products") and IMS then has the EXCLUSIVE RIGHT as to JACADA/400, CST will send IMS a Notice of New Products together with a detailed description of the New Product(s) and a signed copy of any agreement with or proposal from a third party to market or sell licenses for the use of said New Product(s). IMS' shall exercise its right by sending CST a written notice of its exercise of the right within such thirty (30) day period. The terms under which the New Products will be added to the Agreement shall, at the option of CST, be either (i) on the same terms provided in this Agreement for JACADA/400, or (ii) on terms proposed to be granted by CST to any third party.

3. Term of Agreement

(a) The initial term of this Agreement shall be two (2) years ("Initial Term"); PROVIDED, HOWEVER, that the two (2) year period shall begin on the date on which the JACADA/400 product is released and available for Direct Market. During its term, this Agreement shall continue in full force and effect so long as IMS has the EXCLUSIVE RIGHT as to JACADA/400.

(b) IMS' shall have the option to renew this Agreement for additional terms of one (1) year. IMS' shall inform CST in writing of its desire to exercise such option and its desire to negotiate the terms of such renewal not later than ninety (90) days prior to the expiration of the Initial Term of this Agreement. If the parties are unable to agree on the terms for the renewal term within thirty (30) prior to the end of the Initial Term, then the Agreement shall terminate at the end of the Initial Term.

(c) In the event CST, during the term of this Agreement or any extension or renewal period, files a petition for protection under the United States Bankruptcy Code or the equivalent law in another country, is the subject of an involuntary petition under the United States Bankruptcy Code or the equivalent law in another country, is the subject of legal proceedings to foreclose the liens of a creditor(s), or voluntarily or, involuntary surrenders its assets to a creditor(s), this Agreement and the rights granted to IMS herein shall continue in full force and effect for the duration of its term without any right of cancellation by CT, its creditor(s) or any person, representative or Trustee acting on behalf of creditors by reason of CST's bankruptcy or financial condition; provided, CST may terminate this Agreement at

any time for IMS's breach if it complies with paragraph 3(f) hereof.

(d) In the event that CST's rights in any of the JACADA Products and/or the New Products (CST's RIGHTS) are proposed to be acquired, or gained through merger, purchase, or some other means by a third party other than IMS during the term of this Agreement or any extension or renewal of this Agreement. CST will immediately notify IMS and further covenants and promises that the acquisition (by purchase, merger or otherwise) agreement shall provide that the purchaser or acquirer is bound by and accepts the terms of this Agreement.

(e) The parties agree to review the status of this Agreement withing two (2) weeks after the date which is six (6) months after the date one which the JACADA/400 product (excluding the Professional Version of JACADA) is released and available for Direct Market. At such review, the parties shall mutually agree upon any targets and goals which should be implemented in order to effectuate the parties intentions for this Agreement. Thereafter, the parties agree to an annual review, and the first such annual review shall be held within two (2) weeks after the date which is twelve (12) months after the initial review date. If agreement is not reached at any review stage within 30 days, then either party has the option to terminate this Agreement.

(f) Either party may terminate this Agreement for a breach by the other party of any material provision of this Agreement, provided that the terminating party gives the breaching party written notice of such breach, and such breach shall not have been cured by the breaching party withing thirty (30) days after the date of such notice.

4. Non-Compete by IMS

So long as IMS has the EXCLUSIVE RIGHT as to JACADA/400 and IMS has not waived its EXCLUSIVE RIGHTS under this Agreement in writing, IMS will not Direct Market in the Territory a competing product (whether acquired, leased, re-sold, or internally developed) for the IBM AS/400 computer. A product will be considered a competing product for purposes of this Article 4 if it is a product that pre-generates a Java graphical client from legacy systems.

5. Certain Representations and Indemnities

(a) CST warrants that it developed or has sufficient rights in (excluding those matters covered in paragraph 8(b) and 8(c) herein to the JACADA Products and all the elements contained and/or to be contained in the JACADA Products), including, but not limited to, patents, copyrights, trademarks, and other intellectual property rights claimed therein by CST. CST will indemnify IMS and hold it harmless against any and all losses, judgments, settlements, claims or damages (including actual attorneys fees, costs and expenses which for the purposes of this agreement are deemed to be direct damages) which IMS actually incurs or which are finally awarded against IMS as a result of any claim by a third party that the foregoing representations and warranties are not true or accurate in all material respects. PROVIDED, HOWEVER, that CST' shall be notified in writing by IMS within fourteen (14) days of receiving notice of any such claim and FURTHER PROVIDED that CST may defend such claim at CST's sole option. In no circumstance shall IMS enter into any settlement, license, or compromise of any controversy involving any of the patents, trademarks, or copyrights related to the JACADA Products without CST's prior written approval.

(b) IMS warrants and represents that it shall pay for and be solely responsible for all media buys. IMS agrees to indemnify and hold CST harmless against any and all losses, judgments, settlements, claims or damages (including actual attorneys fees, costs and expenses) which CST may incur as a result of any claim by a third party that such media buys have not been paid by IMS. IMS' shall indemnify and hold CST harmless from and against any and all claims, demands, losses and expenses, whether direct, indirect, or consequential 9including reasonable attorney's fees) based upon or arising from misleading statements, misrepresentations or fraud arising from its distribution of the JACADA Products, or other misconduct on the part of or any act attributable to IMS, its officers, directors or employees, or personal injury or physical property damage attributable to IMS, its officers, directors or employees.

(c) CST warrants that each master copy of the JACADA Products provided to IMS by CST, if properly installed and used, shall materially conform to the specifications set forth in the accompanying product documentation, for a period of 3 months from the date of shipment of the master copy to IMS (Hereinafter the "Warranty Period"). IMS' shall promptly notify CST in writing upon the discovery of any non-conformance. CST' shall correct any such non-conformance of which it has been properly notified within the Warranty Period, through the means it determines to be most appropriate, whether by telephone instructions, the issuance of updating documentation, corrective code, or other methods. Any replacement of the master copy shall be effected only after the return of the non-conforming master copy to CST. Notwithstanding the warranty provisions above, CST' shall have no warranty obligations with respect to any part or parts of the master copy which have been damaged in transit or by improper installation or operation, or by misuse, abuse or

negligent use or repair or alteration or improper storage or which have been damaged by use which does not conform to the specific or general instructions of CST or to the provision of the Documentation, or if IMS or any third party has modified or attempted to modify the JACADA Products or if the damage has occurred due to causes external to the JACADA Products, or if the particular JACADA Product has been subjected to an extreme power sure or electromagnetic field, whether or not through the fault of IMS, or if IMS has refused to implement software changes recommended by CST.

THE WARRANTY SET FORTH ABOVE IN THIS PARAGRAPH 5(c) SHALL BE EXCLUSIVE AND IN LIEU OF ALL OTHER LIABILITIES, OBLIGATIONS AND/OR WARRANTIES, EXPRESSED OR IMPLIED (INCLUDING BUT NOT LIMITED TO ANY IMPLIED AND/OR STATUTORY WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, AS WELL AS ANY IMPLIED AND/OR STATUTORY WARRANTIES ARISING FROM THE COURSE OF PERFORMANCE, COURSE OF DEALING, OR USAGE OF TRADE), AND IMS HEREBY WAIVES ALL OTHER RIGHTS, OBLIGATIONS AND/OR WARRANTIES AND ASSUMES ALL RISKS AND LIABILITIES IN RESPECT THEREOF; PROVIDED, HOWEVER, THAT THIS PROVISION SHALL NOT LIMIT IN ANY WAY CST'S REPRESENTATIONS AND WARRANTIES SET FORTH IN PARAGRAPH 5(a). CST MAKES NO WARRANTY THAT THE OPERATION OF ANY OF THE JACADA PRODUCTS WILL BE ERROR FREE OR WITHOUT INTERRUPTION.

CST DOES NOT WARRANT THAT THE JACADA PRODUCTS SHALL OPERATE WITH ANY HARDWARE

AND SOFTWARE OTHER THAN AS SPECIFIED IN THE DOCUMENTATION IN THIS AGREEMENT. CST MAKES NO WARRANTY WITH RESPECT TO THE FITNESS AND OPERABILITY OF THE GENERATED APPLICATION OR THE PRODUCTS.

6. Revenues and Certain Obligations of the Parties

(a) CST will provide IMS with a master copy of JACADA/200 Development Kit on diskette or CD, or from time to time by electronic update, the content of which may not be changed or altered in any way by IMS. IMS may then duplicate, market, sell and distribute licensed copies of JACADA/400 Development Kits and Run-time Versions to its customers. CST will provide IMS with labeling which must be affixed, unaltered and visible upon all licensed copies of JACADA/400 distributed to IMS's customers. CST's license agreement must be included, unaltered, with every licensed copy of a JACADA Product. Upon a sale of a JACADA/400 license, IMS will E-Mail or fax transmit order information to CST including: Customer Name, Address, Telephone Number, Fax Number, E-Mail Address (if available), and appropriate hardware Serial Number(s). CST will then E-Mail or fax back to IMS the Activation Key(s) to enable JACADA/400 on the Customer Machine. Where possible this process will be available through a browser accessing a CST' server. Once a copy of JACADA Product is licensed to an end user, this copy may not be moved from a production, development or test environment machine to any other machine without the purchase of a second license agreement by the end user or prior written approval. New Activation Keys will be issued to IMS for processor upgrades upon verification to CST that a licensed machine has been upgraded.

(b) IMS will be responsible for handling any customers seeking to return merchandise or seeking other adjustments. IMS' shall receive CST's permission to make a refund or other adjustment prior to makings such refund or other adjustment. If CST grants permission for such refund or other adjustment, CST' shall reimburse IMS within fourteen (14) days of notice for one hundred percent (100%) of any refunds given and for any price adjustments made, PROVIDED, however, that such reimbursement for each license shall be limited to the payment paid or payable by IMS to CST with respect to such license pursuant to paragraph 6(d), below.

(c) IMS will establish the Suggested Retail Price (SRP) for the JACADA Products in the Territories under this Agreement. IMS agrees to provide CST thirty (30) days written notice of changes in the SRP.

(d) IMS will remit payment to CST for each license of a JACADA Product as defined in Exhibit B, which amounts are net of any withholding taxes required to be withheld by IMS with respect to such payments due to CST. IMS payments are due and payable at CST's transmission of a JACADA/400 Activation Key to IMS or its customers and will be wired to CST's bank account (see Exhibit B) within 30 days of the end of the month of sale.

(e) There shall be no deduction from payments to CST for any marketing/distribution costs, or for order processing or collection costs, all of which shall be at the expense of IMS.

7. Service Agreements and Technical Support

(a) CST will provide IMS with CST's standard technical support in the form of Internet E-Mail, FAQ, and Internet

FTP and/or magnetic media product fixes (maintenance) at no charge for JACADA/400 licensees.

(b) CST will offer IMS annual enhanced support for resale to JACADA licensees. Enhanced support will include the standard technical support described above and free software updates and enhancements, as well as discounts on future related software products. The annual price to IMS for this service is 25% of the IMS net selling price for each JACADA Product licensee.

(c) CST will provide IMS with CST's standard technical marketing support and on-site training (technical) at the prices set forth on Exhibit B.

(d) IMS will be responsible for all End User Support.

8. Ownership of Materials: Artwork

(a) Rights of ownership in and to all materials already created or to be created for use in connection with JACADA Products, including by not limited to the rights relating to copyright, trademark, and any and all proprietary rights, will vest exclusively in CST, PROVIDED, however, that IMS will have a limited license to reproduce trademarks and trade names as reasonably necessary for the sole purpose of allowing IMS to promote and market JACADA Products pursuant to the terms of this Agreement. IMS agrees to place CST copyright, trademark and all other notices on all JACADA Product materials as instructed by CST.

(b) IMS' shall retain ownership of all of its advertisements, slogans, commercials, artwork and advertising campaigns, including all related copyrights.

(c) IMS' shall retain ownership of its customers names, addresses and other information, and CST' shall not disclose any such information, or communicate (other than normal support) with customers of IMS, without the prior written approval of IMS in each instance. For purposes of this provision, an IMS customer shall be further defined by the customer's address and platform (AS/400).

(d) CST will have the right to review and approve all marketing and sales materials including advertisements developed by IMS under this Agreement, provided that such consent shall not be unreasonably withheld. CST' shall be deemed to have approved any work to which it does not, within fifteen (15) days of the receipt of the advertisement, object in writing.

9. Ownership of JACADA Products.

(a) CST owns and shall continue to own all right, title and interest in and to the JACADA Products, including the source code and object code therein, and all copyrights, trade secrets, patents and other intellectual property rights relating thereto (collectively, Intellectual Property Rights).

(b) IMS Agrees that it shall not do, or cause to be done, any acts or things contesting or impairing or tending to impair any portion of CST's right, title and interest in and to such Intellectual Property Rights. To this end, IMS agrees to take all necessary steps and exercise its best efforts to prevent the unauthorized use, dissemination, distribution or disclosure of the JACADA Products during the terms of this Agreement and thereafter.

(c) IMS agrees that it will in no way alter, deface, remove, cover up or mutilate in any manner whatsoever any

trademark, serial or model number, copyright symbol, copyright notice, tags, labels or other identifying marks and/or information which CST may attach or fix to or make a part of the JACADA Products, and shall include in each package containing any CST Product a copyright notice and any other appropriate indication and/or information reasonable required by CST in order to protect CST's right, title and interest in and to the aforementioned Intellectual Property Rights.

(d) IMS' shall not modify, disassemble, recreate, copy, decompile, reverse engineer or generate the JACADA Products or any portion thereof.

(e) IMS hereby acknowledges that the JACADA Products contain trade secrets and/or proprietary information of CST which are valuable, special and unique assets of CST's business and are CST's absolute property. Trade secrets and proprietary information for the purposes of this Agreement shall include, but shall not be limited to, any technical know-how, techniques, algorithms, processes contained in or used in creating the JACADA Products or any part thereof, designs, data, plans or any other documents or information pertaining to any matters relating to CST or the JACADA Products (hereinafter "Confidential Information").

(f) IMS agrees that at no time during the term of this Agreement nor at any time after its termination shall IMS use or disclose any part of the Confidential Information to any person, firm, corporation, association, or other entity, for any reason or purpose whatsoever. IMS' shall take appropriate measures to insure the security and protection of the JACADA Products, and to prevent access thereto by any third party other than IMS's employees in the normal course of their employment and on a need-to-know basis. IMS' shall cause all

of its employees, directors and managers to conform to the obligations contained in this paragraph. The disclosure or use of Confidential Information by any such employee, director or manager in violation of the provision fo this paragraph shall be deemed for all intents and a breach by IMS itself of the terms stipulated herein.

(g) IMS declares that it is aware that any breach of its undertakings pursuant to the provisions of this paragraph or any part hereof shall substantially diminish the value to CST of its proprietary rights and shall cause CST considerable damage. Thus, if IMS breaches any of its obligations, CST' shall be entitled, without prejudice to any other right or remedy available to CST pursuant to this Agreement or the applicable law, to terminate this Agreement forthwith and to obtain any equitable or other relief available in order to protect its interests. The obligations of IMS under this paragraph survive any termination of this Agreement.

10. Limitation of Liability.

(a) IN NO EVENT SHALL CST BE LIABLE FOR ANY LOSS OF OR DAMAGE TO REVENUES, PROFITS OR GOODWILL OR OTHER SPECIAL, INCIDENTAL, INDIRECT AND CONSEQUENTIAL DAMAGES OF ANY KIND, RESULTING FROM ITS PERFORMANCE OR FAILURE TO PERFORM PURSUANT TO THE TERMS OF THIS AGREEMENT OR ANY OF THE APPENDICES HERETO, OR RESULTING FORM THE FURNISHING, PERFORMANCE, OR USE OR LOSS OF ANY CST PRODUCT OR OTHER MATERIALS DELIVERED TO IMS HEREUNDER, INCLUDING WITHOUT LIMITATION ANY INTERRUPTION OF BUSINESS, WHETHER RESULTING FROM BREACH OF CONTRACT OR BREACH OF WARRANTY OR

OTHERWISE, EVEN IF CST HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES; PROVIDED, HOWEVER, THAT THIS PROVISION SHALL NOT LIMIT IN ANY WAY CST'S REPRESENTATIONS AND WARRANTIES SET FORTH IN PARAGRAPH 5(a).

(b) Notwithstanding anything herein to the contrary, the maximum aggregate amount of money damages for which CST may be liable to IMS under this Agreement, resulting from any cause whatsoever other than for a breach by CST of any of its representations and warranties under paragraph 5(a), shall be limited to the amounts actually paid by IMS to CST under this Agreement.

11. Miscellaneous

(a) Upon request, CST will promptly confirm to third parties the rights of IMS under this Agreement.

(b) All written notices to be sent pursuant to this Agreement shall be delivered to the respective parties at the addresses designated (see Exhibit B) via prepaid, certified mail, return receipt requested. Notice shall be deemed given when mailed.

(c) All materials, products, and inventory produced pursuant to this Agreement shall be returned to CST not later than ninety (90) days after termination of this Agreement except if such materials, products and inventory have been paid for by IMS, in which even IMS' shall have a period of ninety (90) days from the date of termination to distribute such inventory to end users. CST' shall be entitled to payment as provided herein for any such distribution. After such ninety (90) day period, IMS' shall destroy any such inventory.

(d) This Agreement and an extension or renewal of this Agreement is binding on the Parties hereto, their respective successors, representatives, related entities, attorneys and assigns.

(e) This Agreement may be modified only in writing and upon mutual consent of the parties. It sets forth all understandings of the parties. In addition, neither party may assign this Agreement, nor any of the duties and responsibilities described herein, without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

(f) Nothing in this Agreement shall be construed to create a joint venture or partnership between IMS and CST. It is expressly agreed that CST and IMS are acting hereunder as independent contractors and under no circumstances shall any of the employees of one party be deemed the employees of the other for any purposes. This Agreement shall not be construed as authority for either party to act for the other party in any agency or other capacity, or to make commitments of any kind for the account of or on behalf of the other except to the extent and for the purposes provided for herein.

(g) This Agreement will be governed by the laws of the State of Michigan. (The United Nations Convention on Contracts for the International Sale of Goods [1980] shall not apply.) This Agreement, including its exhibits, was written and signed in English. The English text is the only official and controlling text of this Agreement, without regard to its translation into any other language. All disputes hereunder shall be resolved exclusively in Kalamazoo, Michigan, and exclusively by arbitration by the American Arbitration Association in accordance with its commercial arbitration rules. In order to invoke the right to arbitration, a written demand for same

must be filed with the American Arbitration Association, P.O. Box 5105, Southfield, MI 48086 within six (6) months from the date of any breach of this Agreement. If a demand is not timely filed, the claim is forever barred. The party claiming the breach and demanding arbitration shall pay the filing fee(s). The parties shall share, equally, the costs of the Arbitrator, and each side shall pay all its own costs, expenses and actual attorneys fees associated with the arbitration proceedings or preparation therefor.

(h) If any provision of this Agreement shall be held to be invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall in no way be affected or impaired thereby.

(I) All representations and warranties contained herein shall survive termination of this Agreement.

(j) All exhibits attached to this Agreement are incorporated by reference.

(k) All payments required under this Agreement shall be in Pounds Sterling.

(l) This Agreement may be executed by facsimile signatures transmitted to the other party and in counterparts, each such executed counterpart constituting an original but all together one and the same instrument.

IN WITNESS WHEREOF, the parties have signed this Agreement as of the date and year set forth above.

International Marketing Strategies, Inc.

By: /s/_____
Evan C. Harter

Its: /s/_____
Chairman

Client/Server Technology (Europe) Ltd.
By:

Its:

EXHIBIT A
Product Description

Jacada/400
Jacada/400 is the first automated generation technology to deliver Java clients for AS/400 systems without requiring any change to the existing application.

Jacada/400 uses CST's proven rules-based technology to automate the generation and maintenance of feature-rich graphical Java clients. With Jacada/400 businesses can deploy an on-line transaction processing (OLTP) architecture for their missioa critical applications - taking advantage of existing intranet environment and the low-cost of ownership of network computers. The Java-delivered clients also enable the enterprise to provide Internet access to their host applications as needed.

To enable OLTP applications, Jacada/400 delivers a persistent, secure application communications architecture. Jacada/400 works in co-operation with, but independent of

Internet browsers, web servers and HTTP - deploying the Java client using standard web facilities, but connecting to the host with dedicated TCP/IP sockets.

Jacada/400 makes deploying graphical clients easy while making the client-to-host connection robust. Jacada/400 solves the problems of persistence and security by eliminating the browser and the web server from the transaction architecture and providing a dedicated synchronous connection between the Java client and the Jacada/400 Server.

For existing customers of CST, Jacada/400 works seamlessly with CST's GUISys and VBSys products. All three products use CST's KnowledgeBase, the company's rules-based automated generation capability. Customers who have generated Windows or Visual Basic clients, with GUISys of VBSys respectively, can simply regenerate these clients in Java using Jacada/400.

About CST

Founded in 1990, Client/Server Technology Ltd provides quality products and services for automating the generation of graphical clients for host-based applications. CST now offers three products - Jacada/400, GUISys and VBSys - to automatically generate desktop graphical clients for host applications running on mainframe and midrange platforms. GUISys automatically generates a Windows graphical client. VBSys automatically generates the new client application in fully functional Visual Basic. Jacada/400 is a web-enabling generation technology which generates the client in Java.

Customers include leading Independent Software Vendors (ISV's), Value Added Resellers and large multinational

corporate accounts. CST can be reached by visiting its homepage on the worldwide web (http://www.cst.com).

Exhibit B

Pricing	SRP Per Pack	CST Per Pack
JACADA/400	£10,000	£1,875
Base package includes:		
SDK (Development Tool Kit)		
10 Concurrent Runtime licences		
Next additional SDK	£ 5,632	£1,408
Then; for each subsequent copy	£ 2,500	£ 625
Additional Concurrent Runtime:		
(Note: per server prices)		
10	£ 3,750	£ 938
40	£12,500	£3,125
100	£25,000	£6,250

Support Costs:

Consultancy

Plus Expenses £ 700pd

Training

Plus Expenses £ 438pd

Performance Volumes

Performance volumes will be mutually agreed at a review six months into the term of the agreement

Notices

Notices under this agreement shall be sent to:

Client/Server Technology (Europe) Limited

Attn. Frank Coggrave
Ormond House
26-27 Boswell Street
London, WC1N 3JZ
United Kingdom
Phone: +44 (0) 171 404 8081
Fax: +44 (0) 171 404 8083
Email: fcoggrave@cste.co.uk

International Marketing Strategies, Inc.
Attn. Tony Shearing
Ladyfields
Bayton
Nr. Kidderminster
Worcs. DY14 9HT
United Kingdom
Phone: +44 (0) 1299 832 066
Fax: +44 (0) 1299 832 067
Email: tonyims@IBM.Net

APPENDIX I

FOREIGN ARBITRAL AWARDS

February 13, 1970 - Ordered to be printed

Mr. Fulbright, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany S. 3274]

The Committee on Foreign Relations, to which was referred the bill (S. 3274) to implement the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 3274 (introduced by Senator Fulbright, by request, on December 19, 1969), is to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which was approved by the Senate on October 4, 1968, by a vote of 57 to 0 (Ex. Rept. No. 10, 90-2). The bill would create a new chapter under title 9 of the United States Code (the Federal Arbitration Act) dealing exclusively with recognition and enforcement of awards pursuant to the provisions of the convention.

BACKGROUND

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted at the conclusion of a United Nations conference which was held in New York from May 20 to June 10, 1958. The convention entered into force on June 7, 1959, and at the present it is in effect for 34 countries. Although the United States participated in the conference, the convention was not signed on behalf of our Government at that time because the American delegation felt that certain provisions were in conflict with some of our domestic laws. According to the administration, however, as a result of increasing support for the convention (both within and without the Government), the United States decided in favor of accession and it was transmitted to the Senate for advice and consent on April 24, 1968. Even though the convention was approved in October 1968, the instrument of accession will not be deposited until S. 3274 is enacted into law.

SECTION-BY-SECTION ANALYSIS

A summary of the proposed provisions of the new chapter 2 which would be added to the Federal Arbitration Act (title 9, U.S.C.) are set forth below:

Section 201 provides that the Convention shall be enforced in United States courts in accordance with the provisions of the new chapter.

Section 202 defines the agreements or awards that fall under the Convention. The second sentence of section 202 is intended to make it clear that an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not

enforceable under the Convention in U.S. courts unless it has a reasonable relation with a foreign state.

Section 203 gives original jurisdiction over any action or proceeding falling under the Convention to the district courts of the United States regardless of the amount in controversy.

Section 204 contains provisions relating to venue with respect to such action or proceeding.

Section 205 permits removal of an action or proceeding relating to an agreement or award falling under the Convention from a State court to a district court of the United States.

Section 206 permits a court to direct that arbitration be held at the place provided for in the arbitration agreement "whether that place is within or without the United States." It also permits the court to appoint arbitrators in accordance with the provisions of the agreement.

Section 207 provides that within 3 years after an arbitral award is made, any party to the arbitration may apply to any court having jurisdiction for an order confirming the award against any party to the arbitration.

Section 208 makes the provisions of the Federal Arbitration Act applicable to actions brought under the Convention to the extent that such provisions are not in conflict with the implementing legislation or the Convention as ratified by the United States.

COMMITTEE ACTION AND RECOMMENDATION

The Committee on Foreign Relations held a public hearing on S.3274 on February 9, 1970, at which time Mr. Richard D. Kearney, Office of the Legal Adviser, Department of State, testified in support of the bill. The transcript of that hearing is reprinted in the appendix to this report.

The committee has received a number of communications from lawyers and businessmen urging early and favorable action on S. 3274, and so far as is known, there is no opposition to the bill. It has the support of the American Bar Association, the American Arbitration Association, the International Chamber of Commerce, the Department of Justice and the Bureau of the Budget.

In the committee's view, the provisions of S. 3274 will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts. The committee recommends, therefore, that the Senate approve S. 3274 at an early date.

APPENDIX

HEARING HELD BEFORE THE COMMITTEE ON FOREIGN RELATIONS ON FEBRUARY 9, 1970

THE CHAIRMAN. The next matter on the agenda this morning is on S. 3274, to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Mr. Richard D. Kearney will testify for the Department of State.

Mr. Kearney, do you have a prepared statement?

STATEMENT OF RICHARD D. KEARNEY, CHAIRMAN OF THE SECRETARY OF STATE'S ADVISORY COMMITTEE ON PRIVATE INTERNATIONAL LAW; ACCOMPANIED BY HERMAN MARCUSE, DEPARTMENT OF JUSTICE.

MR. KEARNEY. Yes, sir, I do.

THE CHAIRMAN. Will you proceed, sir.

MR. KEARNEY. Thank you. Mr. Chairman.

During the hearing before the Foreign Relations Committee on United Nations Convention on the recognition and Enforcement of Foreign Arbitral Awards the question if implementing legislation was discussed and it was made clear that the United States would not deposit its instrument of accession until the necessary implementing legislation had been enacted. The bill which is presently before you sets up the legal structure that is required to implement the

convention. The legislation has been cast in the form of an addition to title 9 of the United States Code, which contains the United States Arbitration Act. This proposal for a new chapter represents somewhat of a change in the original plans for implementing legislation which were discussed in the hearing on the Convention. At that time we were considering amendments to certain sections of the United States Arbitration Act and title 28 of the United States Code, the Federal Civil Procedure Act, as appears on page 8 of the committee's report (Ex. Rept. 10, 90th Congress, second session). The letter to the Vice President transmitting the legislation explains the reason for the change in plans, which was basically to avoid the confusion which might result from a series of minor changes in the different sections of the Arbitration Act as between cases falling under the act in its present form and cases falling under the Convention.

The kind of problem that we wished to avoid is well illustrated by section 202 of the new chapter 2. This section defines the arbitral agreements or awards that are considered to fall under the Convention for the purposes of the implementing legislation.

Paragraph 1 of article I of the Convention provides that the Convention applies to the recognition and enforcement of arbitral awards without any limitation as to the nature of the relationship that gave rise to the award. It might, for example, be a question of family status. However, paragraph 3 of article I of the Convention permits a state party to the Convention to file a declaration that the Convention will apply only to legal relationships that are considered as commercial under the national law of that state. As was stated in the hearings on the Convention, the United States will file such a declaration because our purpose in adhering to the Convention is for the beneficial effects it will produce for the foreign

commerce of the United States and not to make any changes with respect to matters that are traditionally within the jurisdiction of the 50 States of the Union.

Consequently it is necessary to include the substance of this limiting declaration in the legislation that implements the Convention. This is what the first sentence of section 202 intends. It was not, of course, necessary to make any reference to the national law of the United States in the first sentence of section 202 because the definition of commerce contained in section 1 of the original Arbitration Act is the national law definition for the purposes of the declaration. A specific reference, however, is made in section 202 to section 2 of title 9, which is the basic provision of the original Arbitration Act.

At the same time we were faced with the problem that section 1 of the act, which defines commerce, specifically includes both interstate and foreign commerce, while the implementation of the Convention should be concerned only with foreign commerce. Consequently it was necessary to modify the definition of commerce to make it quite clear that arbitration arising out of relationships in interstate commerce remains under the original Arbitration Act and is excluded from the operation of the proposed chapter 2.

To achieve this result we have included in section 202 a requirement that any case concerning an agreement or award solely between U.S. citizens is excluded unless there is some important foreign element involved, such as property located abroad, the performance of a contract in a foreign country, or a similar reasonable relation with one or more foreign states. The reasonable relationship criterion is taken from the general provisions of the Uniform Commercial Code. Section 1-105(1) of the code permits the parties to a transaction that

bears a reasonable relationship to any other state or nation to specify that the law of the state or nation will govern their rights and duties.

In this connection, of course, it should be recalled that what we are dealing with under the Convention is solely a situation in which the parties have voluntarily agreed to arbitration. The Convention and implementing legislation will apply to a transaction will apply to a transaction only because the parties to that transaction have agreed to settle disputes by arbitration. The provision on choice of law in the Uniform Commercial Code is also based on the same kind of voluntary action by the parties to a transaction. Since the Commercial Code is basic law on commercial transactions in the United States it seemed appropriate to incorporate its test of reasonable relationship into the implementing legislation on foreign arbitral awards.

The declaration limiting the application of the Convention to commercial matters applies both to the recognition and enforcement of arbitral awards under article 1 of the Convention and to the recognition of an agreement to arbitrate under article 2 of the Convention. Consequently the provisions of section 202 or the implementing legislation are applied specifically both to enforcement of arbitration agreements and of arbitral awards.

Sections 203, 204, and 205 of the new chapter 2 take care of certain technical problems arising out of differences between the original Arbitration Act and the convention. Under section 4 of the original set an application for enforcement of an arbitration agreement may be made to a U.S. district court which, "Save for the agreement, would have jurisdiction under title 28 in a civil action or in admiralty of the subject matter ***." This makes such a case subject to

the amount-in-controversy provisions of title 28 relating to actions based on a Federal question or on diversity of citizenship.

The arbitration convention does not contain any provision with respect to the amount in controversy. For the effective implementation of the convention, therefore, section 203 gives the district courts of the United States original jurisdiction in cases arising under the convention "regardless of the amount in controversy."

The venue provisions in section 204 of the new chapter are substantially the same as those of the original act with one exception. If an arbitration agreement falling under the convention specifies a particular place in the United States where the arbitration is to take place, an enforcement action may be filed in the U.S. court for the district where that place is. To illustrate – Mr. Smith of Chicago and Mr. Jones of London agree to arbitrate any dispute arising out of a contract for the export of machinery from the United Kingdom to the United States at the office of the American Arbitration Association in New York City. A dispute arises and Mr. Smith of Chicago refuses to comply with the agreement to arbitrate. Mr. Jones of London could seek enforcement of the agreement either in the northern district of Illinois or the southern district of New York. On the other hand, if Mr. Jones refuses to arbitrate, Mr. Smith can seek enforcement either in the southern district of New York, or in the appropriate court in London. The provision in section 204 has obvious practical advantages since the arbitration machinery selected by the parties will be within the immediate purview of the enforcing court and the original agreement of the parties with respect to the appointment of arbitrators and the like can be conveniently carried out.

The original Arbitration Act does not contain specific provisions regarding removal to the Federal courts of cases that may fall under it. The case law on the right or removal is not settled. In the *Prima Paint Case* (388 U.S. 395—1967), however, the Supreme Court made it quite clear that arbitration agreements relating to interstate or foreign commerce were fully within the ambit of Federal law. On this basis, it appears appropriate, particularly in implementing a treaty, to clarify the removal issue. Section 205 provides a right to remove an action relating to an arbitration agreement or arbitral award falling under the Convention from a State court to the appropriate district court.

Because we are dealing solely with foreign commerce it appears very likely that many of the arbitration agreements falling under the Convention will provide for arbitration outside the United States. In commodity contracts, for example, provisions for arbitration in London under Corn Exchange rules are quite common. The uniform Arbitration Act provides that the district court may direct "the parties to proceed with the arbitration in accordance with the terms thereof." However, in this area the case law is not clear whether the district court will order an arbitration to be held outside the United States. To clarify this issue, section 206 specifically provides that the district court may order the arbitration held at the place provided in a contract "whether that place is within or without the United States."

Section 207 deals with two problems relating to the enforcement of foreign arbitral awards. The Uniform Arbitration Act has a time period of 1 year within which an application may be made for an order confirming an award. The Arbitration Convention does not contain any specific provision on this point. However, all of the experts on arbitration who worked with us considered that a 1-year

period for the enforcement of foreign arbitral awards was much too short. In many cases enforcement would normally be sought outside the United States as a first step. An action would be filed here only after efforts to obtain enforcement in a foreign country had failed. It was, therefore, essential to allow time for these initial enforcement efforts outside the United States and the consensus was that 3 years is a reasonable period in these circumstances. The second problem was that the grounds for refusal or deferral of the recognition or enforcement of an arbitral award are somewhat different under the Uniform Arbitration Act than under the Convention. For example the Convention has a specific reference to the incapacity and thus leaves this to be dealt with under the general law of contracts. To avoid any possible conflict section 207 provides that the refusal and deferral clauses of the Convention are controlling.

Finally in section 208 —

THE CHAIRMAN. What do you mean by incapacity; mental incapacity?

MR. KEARNEY. Mental incapacity, infancy, that series of problems.

THE CHAIRMAN. I see.

MR. KEARNEY. Finally in section 208 we have a residual clause under which the original Arbitration Act applies to all matters arising under the legislation implementing the convention except when the convention or the implementing legislation have conflicting provisions.

We believe that the proposed chapter 2 reconciles the major differences that exist because of the differences between

the language and conceptual approach of the convention and of title 9 and 28 of the United States Codes, and that the proposed system of implementation through the U.S. district courts will assist the uniform and efficient enforcement of arbitration agreements and awards in foreign commerce.

Thank you, Mr. Chairman.

I should add Mr. Herman Marcuse of the Department of Justice is here also and would answer any questions that fall more in the sphere of that Department than in the State Department.

THE CHAIRMAN. Is it contemplated that any of the arbitration awards may be submitted to the World Court?

MR. KEARNEY. No, Mr. Chairman.

THE CHAIRMAN. The World Court has nothing whatever to do with it?

MR. KEARNEY. Nothing whatever. This implementing legislation puts the implementation in the U.S. District courts.

The Chairman. Or in London. You mentioned an example dealing with an appropriate court in London.

MR. KEARNEY. Yes, sir. This is implementing legislation for the United States.

THE CHAIRMAN. Yes.

MR. KEARNEY. Under an arbitration agreement such as I mentioned.

THE CHAIRMAN. Yes.

MR. KEARNEY. Where you have three points of contact; London, New York, Chicago.

THE CHAIRMAN. Yes.

MR. KEARNEY. Under our legislation, under the legislation as drafted, as far as the United States is concerned, the action could be brought in Chicago or in New York City. If the particular plaintiff, the Chicago merchant, decided he would rather sue in London under English law for some reason than in New York, this would be up to him to decide.

THE CHAIRMAN. I thought perhaps the parties who make the agreement could agree to submit it to the World Court believing that they might get a more impartial view there. Are they restricted or prohibited from doing this? Supposing you had a man who lives in Amsterdam, we will say, at The Hague, could he submit it to the World Court? I am just curious.

MR. KEARNEY. No, he could not, Mr. Chairman.

THE CHAIRMAN. He could not.

MR. KEARNEY. Because the International Court only hears disputes between states.

THE CHAIRMAN. I see.

MR. KEARNEY. Or advisory — requests for advisory opinions from international organizations.

THE CHAIRMAN. So even if he wanted to he couldn't. I wanted to make this clear.

MR. KEARNEY. He could not.

THE CHAIRMAN. The Senate approved the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in October of 1958.

Why did it take so long to submit this implementing legislation?

MR. KEARNEY. The reason, Mr. Chairman, was that the American Bar Association had prepared or suggested some implementing legislation, and we thought that was perfectly adequate.

But before we sent it up we had it checked by the Advisory Committee on Private International Law which has representatives of all the major legal organizations on it, and the judges and practicing lawyers on the committee decided that if we scattered these different sections around through titles 28 and 9 that it would make it more difficult on the practicing lawyer and the judge to handle cases of this character. So they suggested that we get together a committee of experts in order to review the proposals of the American Bar Association and put them into, in effect, one chapter or consider how best we could do it, and we had several meetings with experts on this. They decided putting all the provisions in this chapter 2 of the Arbitration Act was the best way of doing it. The review by the experts also indicated a series of problems that weren't taken care of in the American Bar Association proposals and we worked those out, and the process of doing this managed to take up about a year.

THE CHAIRMAN. Well, I just wanted to make it clear that this delay, which some people constantly complain about as being due to the Congress, and the Senate in particular, is not due to the Senate because this legislation was only received in December, and it is now being taken up. The delay was due to the reasons you have just given and not in any way attributable to dilatory tactics on the part of the Senate Committee on Foreign Relations; is that right?

MR. KEARNEY. That is absolutely correct, Mr. Chairman. It is really due to the fact that practicing lawyers wanted to be sure they could handle this problem.

THE CHAIRMAN. I wanted to make it clear it wasn't our fault. I may say this was true of a number of pieces of legislation last year. They came up very late; not nearly as soon as they normally do.

Does this legislation have any effect whatever on State laws?

MR. KEARNEY. No, Mr. Chairman, it does not. It concerns in effect solely the jurisdiction of the Federal district courts.

THE CHAIRMAN. And it does not alter or change a citizen's rights under State laws?

MR. KEARNEY. Not at all.

THE CHAIRMAN. Does it in any way broaden Federal authority?

MR. KEARNEY. Not basically. It provides for the right of removal to the district court from the State court in a case

that falls under the Convention, but what we are dealing with is foreign commerce which now is fully within the ambit of Federal authority.

THE CHAIRMAN. Whether or not this comes into effect all depends upon an agreement entered into voluntarily but the parties. Is that correct?

MR. KEARNEY. That is correct, sir.

THE CHAIRMAN. In other words, you are not imposing this on people who do not wish any particular procedure; is that correct?

MR. KEARNEY. That is absolutely correct.

THE CHAIRMAN. So that what you are doing is setting up a procedure by which citizens who would normally be of different countries and who wished to resort to this method of settling their differences could do so; is that correct?

MR. KEARNEY. That is correct, sir.

THE CHAIRMAN. So there is no possible opposition based upon the idea we are now reaching out and subjecting citizens to further arbitrary intervention of the Federal authorities or any other authorities in their private affairs. That is not justified; is that correct?

MR. KEARNEY. That is correct.

The basic reason that we propose this legislation and to become party to the Convention is because the people engaged in foreign trade consider arbitration is a very economical and

speedy way of settling commercial disputes and they are the ones who wanted this.

THE CHAIRMAN. Correct.

It is more sophisticated way of dealing with these matters.

MR. KEARNEY. That is correct also.

THE CHAIRMAN. One last unrelated question. The staff just called my attention to the fact that you have the personal rank of ambassador. How did that happen? Could you also tell us on what grounds and in what respect is it of help and of importance to you and why do you need it?

MR. KEARNEY. Yes, sir.

The President accorded me the personal rank of ambassador after I became a member of the United Nations International Law Commission and the basic reason was that of the 25 members of the Commission four were ministers of justice and another 12 or 13 were ambassadors, and the basic thought was that it would be desirable that I have approximately the same rank as the rest of the people on the Commission.

From the standpoint of the Commission I think it is valuable to be on the same status as other people who are engaged in a particular form of activity. For example, at conferences I have been to recently almost every head of the delegation had the rank of ambassador. This is just sort of a standard thing in international organization activities now and I suppose it is somewhat a question of face.

THE CHAIRMAN. A question of face. If you weren't an ambassador they wouldn't treat you with proper respect; is that what it comes to?

MR. KEARNEY. No; they would treat me with proper respect I am sure.

THE CHAIRMAN. What do you mean when you say it is a matter of face? Is it your face or the face of the United States that is involved?

MR. KEARNEY. Well, I think it is the face — not necessarily the United States, but that it makes dealing with the other people somewhat easier. They consider you as roughly their — on the same status.

THE CHAIRMAN. They would feel demeaned to speak to you if you weren't an ambassador; is that correct?

MR. KEARNEY. No; I don't think they would at all.

THE CHAIRMAN. How would it affect you? This is a great mystery to me. The methodology of the State Department puzzles some of us more common types very deeply and I just wondered about it. I just can't quite understand it. How you would suffer from having been a minister or whatever you were rather than an ambassador. You obviously aren't an ambassador to a foreign country in the sense that the word is used in the Constitution.

MR. KEARNEY. No, sir; that is quite true.

THE CHAIRMAN. What is the difference between an ambassador with a personal rank and a special representative

of the President? What would be the difference in the way they would receive you?

SENATOR AIKEN. I would like to answer that. The Ambassador gets invited.

THE CHAIRMAN. To what?

SENATOR AIKEN. To whatever it is. The higher the level, the better.

THE CHAIRMAN. You mean you would not be invited to dinner if you hadn't been an ambassador?

MR. KEARNEY. No, sir.

SENATOR AIKEN. It would depend on the dinner.

THE CHAIRMAN. Is that what the Senator means? I have seen lots of people at the White House who are not ambassadors. In fact the major part of them are not. They are contributors; they are primarily contributors. That is what it takes to get invited to the biggest dinner party. You don't have to be an ambassador. I don't understand the rationale for it. This is a matter that I am sure is not your business but if you throw any light on it sometime at a later date I would welcome it.

MR. KEARNEY. I have a hard enough time with these private law international problems.

THE CHAIRMAN. I know you didn't originate it but I thought since you were one of them I might ask you about it. I don't see that you have suffered any great harm in what the title is. The trouble with this practice is that it mixes up the

concept of ambassadors. Under the Constitution they are supposed to be confirmed by the Senate and it is supposed to be a matter of considerable prestige with a very special international connotation, and to begin to use the title in other ways seems to me to confuse the matter. That is primarily the thing that troubles us.

Senator Aiken, are you going to enlighten me?

SENATOR AIKEN. It will take quite a while to enlighten you on that, I would think.

You mentioned the fact that a matter could be transferred from the State court to the district court. Who would arrange for the transfer?

MR. KEARNEY. This would be done by action of the party in the normal removal way. This, of course, would be a suit between two private parties.

SENATOR AIKEN. One of the parties then?

MR. KEARNEY. One of the parties would file a writ in a district court asking for removal.

SENATOR AIKEN. Would you say that this convention would in no way affect decision or operations of the World Court?

MR. KEARNEY. No, sir.

SENATOR AIKEN. Are you favorably impressed with the operations of the World Court?

MR. KEARNEY. On the whole, yes. I could disagree with some of its decision but then we all disagree with some of the decisions of courts.

SENATOR AIKEN. How many cases do they hear a year on the average?

MR. KEARNEY. I do not have the statistics in my mind. In the last year they decided two cases, one the *North Sea Gas and Oil* case, and the other the *Barcelona Traction* case. This is perhaps not too bad an average for an International Court of this character.

What are involved are disputes between states that they consider important enough to put to this Court, and states are somewhat reluctant to submit cases to the International Court. They would rather settle it by diplomacy or in a similar fashion.

SENATOR AIKEN. Of the two cases they decided last year, was the decision accepted by both parties after it was made.

MR. KEARNEY. Yes, Senator.

SENATOR AIKEN. It was?

MR. KEARNEY. Yes.

SENATOR AIKEN. Was that usual?

MR. KEARNEY. Yes. Some of the issues remain to be worked out. The *North Sea Oil and Gas* case is a complicated decision involving the rights to exploit the Continental Shelf in the North Sea for gas and oil deposits. And Germany was

trying to get a bigger slice, if possible, under the rules relating to the Continental Shelf, from the Netherlands — it was not the United Kingdom — wait a minute, the parties slip my mind a moment, it was — it was the Netherlands and Denmark. They will have to go through this process of drawing these lines in accordance with the decision to, in effect, give, cut pieces of pie out of the Continental Shelf.

SENATOR AIKEN. Do you recall how may cases the World Court has decided in which the United States was one of the litigants?

MR. KEARNEY. The United States has participated in a number of the requests for advisory opinions.

SENATOR AIKEN. In an advisory class?

MR. KEARNEY. Yes; advisory opinions.

SENATOR AIKEN. But not as a litigant.

MR. KEARNEY. We have filed, we filed during the fifties a series of cases involving injury or damage to airplanes, for example, against the Soviet Union and some of the Eastern European countries; but these were not litigated, they were not heard, because the countries had not accepted the mandatory jurisdiction of the Court, and as a result of this we were, in effect, nonsuited.

Of course, one problem is, and one thing that somewhat intimidates us from going to the Court is that under the Connally reservation since we have the right to claim any matter is within our domestic jurisdiction any other party that has accepted the mandatory jurisdiction of the Court has precisely this same right. That is, since we have the

reservation they can claim the reservation against us also. Bulgaria did just this in an aerial incident case. In some cases, and I wouldn't like to mention any particular states involved, but in some cases where we have proposed going to the Court the other country has said " If you take us to Court, if you file a petition in the Court, we will claim the Connally reservation against you, and you won't be able to proceed with your case."

SENATOR AIKEN. How many decisions affecting the United States have actually been granted by the World Court?

MR. KEARNEY. No final decision directly affecting the United States.

SENATOR AIKEN. None at all?

MR. KEARNEY. That is my recollection, directly to which the United States was a litigating party. But I will have to check that.

SENATOR AIKEN. Well, the reason I asked that, I think there were a couple of cases in which the verdict of the Court was not accepted; therefore, as far as we are concerned, I don't see what the World Court had been but a to[t]a! loss in settling our international disputes.

MR. KEARNEY. We have benefitted indirectly in a number of cases. If, for example, in the El Al airplane incident with Bulgaria—

SENATOR AIKEN. My assistant says we got an advisory opinion from the World Court as to the legality of the United Nations bonds.

MR. KEARNEY. That is correct.

SENATOR AIKEN. That was a wonderful idea and it worked so that the smaller countries of the world made the appropriations and levied the assessments. Otherwise four or five of the big countries would have paid the bill. That was when President Kennedy was in the White House.

MR. KEARNEY. That is correct.

Excuse me, I remember we have been involved in three litigated cases.

We did litigate certain rights in Tangiers, a case involving the rights of U.S. nationals in Tangiers.

There may be one or two others; I can get a list for you, Senator, if you would like.

SENATOR AIKEN. I was just trying to think of some way in which the World Court might have been a benefit.

(The following information was subsequently supplied.)

Two of these were disposed of on procedural grounds. In what is known as the *Albanian Gold* case, the issue was whether certain gold seized in Rome after World War II by the Allies should go to Italy or to Albania who had conflicting claims to ownership, or to the United Kingdom in order partially to pay the damage judgment against Albania which the World Court had handed down in the *Corfu Channel* case. The United States had no direct interest. It was a stakeholder as a member of a tripartite commission set up to hold the gold until proper disposition of it could

be made. The World Court dismissed the case because Albania refused to become a party and the Court considered Albania's participation essential to adjudication of the issues.

A second case likewise did not go to final judgment. This was the dispute between Switzerland and the United States over whether the vesting by the United States of shares of General Aniline and Film Co. was justified on the ground that the German cartel I.G. Farben was the actual owner although the shares themselves were held by Interhandel, a Swiss company. The Court issued rulings on certain preliminary matters but declined to proceed to consideration of the principal issue because the U.S. Supreme Court had issued an order reopening the action which had been dismissed by the U.S. district court because Interhandel had not produced certain documents. As things turned out the dispute was settled by a subsequent compromise agreement between Switzerland and the United States and therefore never got back to the World Court.

The third case, which was the only one that proceeded to a judgment on the merits, was brought by France, as the protecting power in Morocco, against the United States. The United States claimed U.S. citizens were exempt from certain economic and fiscal measures in Morocco on the basis of an 1837 treaty that gave jurisdiction in Morocco over U.S. citizens to the American consul in certain cases, as well as a unilateral grant of most-favored-nation treatment. The World Court, while recognizing the continued applicability of the 1837 treaty on the major points in issue, rejected claim that the treaty required

the assent of the United States before laws or regulations could be applied to citizens of the United States in the French zone of Morocco and decided that the most-favored-nation clause did not require the continuation of privileges to the United States after the most favored nations, in this case the United Kingdom and Spain, had themselves renounced such privileges. It should be noted that after Morocco gained her independence in 1958 the United States renounced its right to extraterritorial jurisdiction.

Requests for advisory opinions can only be made by the organs and specialized agencies of the United Nations. However, the United States submitted a brief to the Court on the legal issues raised in each of the 12 requests the Court has dealt with and presented oral arguments in three of these proceedings.

SENATOR AIKEN. Do you know of any objections to this particular bill?

MR. KEARNEY. No, Senator, I do not.

SENATOR AIKEN. You don't. I believe the American Bar Association has already approved it.

MR. KEARNEY. It has, Senator?

SENATOR AIKEN. Yes. I have no more questions.

THE CHAIRMAN. I don't see any objections myself. Do either of you have anything further to say.

MR. KEARNEY. No, thank you, sir.

THE CHAIRMAN. I hope we won't be as long passing it as you were bringing it up.

MR. KEARNEY. I hope not.

THE CHAIRMAN. By the way, it occurred to me when I was asking you, was Ben Franklin a personal ambassador? Did he have the personal rank of ambassador?

MR. KEARNEY. Ben Franklin?

THE CHAIRMAN. Yes.

MR. KEARNEY. As a matter of fact, my recollection is that the United States did not use the title of ambassador until about 1870 or something like that.

THE CHAIRMAN. So he didn't have the personal rank of ambassador?

MR. KEARNEY. I would think he would have been an envoy extraordinary.

THE CHAIRMAN. That is what I think. I just wondered. He did pretty well considering all his limitations, didn't he?

MR. KEARNEY. He did very well.

THE CHAIRMAN. He was even invited to dinner, I am told. Thank you very much, Mr. Kearney.

MR. KEARNEY. Thank you, Mr. Chairman.

CHAN[G]ES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill (S.3274), as reported, as shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

APPENDIX J

Articles

When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*

Dr. Albert Jan van den Berg†

I. Introduction

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958[1] (the New York Convention) applies to the recognition and enforcement of arbitral awards made in the territory of

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[1] 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, (entered into force for the United States on December 29, 1970) [hereinafter cited as New York Convention]. The New York Convention is adhered to by 68 States at the time of writing this article (April 1985).

another State[2] To this territorial criterion for a foreign arbitral award, there is added the following criterion:

> It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.[3]

The later criterion of nondomestic arbitral awards was discussed by the U.S. Court of Appeals for the Second Circuit in the case *Bergesen v. Joseph Muller Corp.*[4] The court held that an award made in the State of New York between two foreign parties is to be considered as a nondomestic award within the meaning of the New York Convention and its implementing legislation.[5]

The decision of the court of appeals has been received favourably by commentators in the United States.[6] The

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[2] *Id.* at art. I(1). According to article I(3), when adhering to the New York Convention, a State may declare on the basis of reciprocity that it will apply the New York Convention to the recognition and enforcement of awards made only in the territory of another *Contracting State*. *Id.* at art. I(3). This so-called "reciprocity reservation" is made by two thirds of the *Contracting States*, including the United States.

[3] *Id.* at art. I(1).

[4] *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983).

[5] *Id.* at 932. The implementing legislation may be found at Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1980).

[6] *See, e.g.*, Feldman, *An Award Made in New York Can Be a Foreign Arbitral Award*, 39 ARB. J. 14 (1984); Love, *Arbitration*, 15 J. MAR. L & COM. 134 (1984); Phillips, *Recognition of Foreign*

decision can indeed be regarded as a confirmation of the favourable attitude of the American courts towards international arbitration. It may be questioned, however, whether the court of appeals did not go too far in supporting international arbitration. Is an arbitral award made in the United States a nondomestic award within the meaning of the New York Convention for the simple reason that both parties are foreign?

The question what constitutes a nondomestic award within the meaning of the New York Convention is one of the most complicated issues posed by this Treaty. In the first two sections of this article, the facts of the *Bergesen* case and the judgment of the court of appeals will be summarized with the purpose of providing the factual and legal framework within which the question has arisen. The legislative history *(travaux préparatoires)* of the second criterion of the New York Convention's scope will be examined in a third section. This examination will be followed in the fourth section by a so-called "conventional interpretation" of the second criterion, which is based on the legislative history and the text of the New York Convention. The court of appeals' interpretation, which may be called "the expansive interpretation," will be discussed in the fifth section. The possible consequences for practice resulting from the expansive interpretation are investigated in the sixth section. The *Bergesen* case is not only troublesome for the question of what constitutes a nondomestic award. To complicate matters further, Muller also argued that the award in question could be considered a so-called "stateless award." The question of what constitutes

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Arbitral Awards: The Second Circuit Provides a Hospitable Forum, 10 BROOKLYN J. INT'L L. 489 (1984).

a "stateless award," and whether such an award comes within the New York Convention's purview is the subject of the seventh and last section of this article.

II. Facts

The facts of the case are relatively simple. Bergesen, a Norwegian shipowner, and Muller, a Swiss company, entered into three charter parties in 1969, 1970 and 1971. The 1969 and 1970 charter parties provided for the transportation of chemicals from the United States to Europe. The 1971 charter party concerned the transportation of propylene from the Netherlands to Puerto Rico. Each charter party contained an elaborate ad hoc arbitration clause, the pertinent part of which provided:

> The arbitration shall take place in New York, New York, and shall be governed by the Laws of the State of New York, and the award when made by a majority of the arbitrators may be enforced in any court which shall have jurisdiction, and shall be final and binding on the parties anywhere in the world.

In 1972, after disputes had arisen in the course of performing the 1970 and 1971 charter parties, Bergesen made a demand for arbitration of its claims for demurrage as well as for shipping and port expenses. Muller denied liability and asserted counterclaims. In the award, rendered in New York City on December 14, 1978, the arbitrators found in favour of Bergesen and dismissed all but one of Muller's counterclaims. The net award to Bergesen was $61,406.09 with costs and interest.

Bergesen started enforcement proceedings in Switzerland on the basis of the New York Convention.[7] The Judge of the Court of First Instance of Zurich declared the award enforceable in summary proceedings. The Court of Appeal of the Canton of Zurich affirmed on December 8, 1980. Muller took recourse to the Swiss Federal Supreme Court, contending that the award had not become binding, within the meaning of the New York Convention.[8] To this end, Muller relied on a provision of the New York Civil Practice Law and Rules (C.P.L.R.), according to which a court must confirm an award upon application by a party made within one year after its delivery to him, unless the award is vacated or modified.[9] Muller argued that only after confirmation of the award by the New York court could the award become binding and enforceable under the New York Convention.

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[7] *Summarized in* 9 Y.B. COM. ARB. 437 (1984).

[8] Article V(1)(e) of the New York Convention provides:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> ...
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

New York Convention, *supra* note 1, art. V(1)(e).

[9] Muller relied on section 7510 which reads: "The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." N.Y. CIV PRAC. LAW § 7510 (McKinney 1980).

At this juncture it should be mentioned that the drafters of the Convention expressly abolished the requirement of leave for enforcement on an award in the country where the award is made. This requirement existed in practice under the New York Convention's predecessor, the Geneva Convention of 1927.[10] The Geneva Convention provided that in order to obtain enforcement of an award made in another State, the award should be "final."[11] The word "final" was interpreted by a number of courts as requiring leave for enforcement in the country where the award was made. Considering this requirement too cumbersome for the international enforcement of arbitral awards, the drafters of the New York Convention substituted the word "binding" in place of the word "final."[12]

According to this well established principle of the New York Convention, which is unanimously confirmed by all courts in the Contracting States,[13] no confirmation of the award by the New York court was needed for enforcement. Nevertheless, Bergesen's lawyers apparently did not wish to take any risk and filed a petition in the district court in New

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[10] Convention on the Execution of Foreign Arbitral Awards, Geneva, Sept. 26, 1927, 92 L.N.T.S. 302 (1929-1930). The United States has not adhered to this Convention.

[11] *Id.* at art. I(d).

[12] *See generally* A. J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 333-37 (1981) (discussing the legislative history of the substitution of "binding" for "final") [hereinafter cited as VAN DEN BERG].

[13] *See id.* at 337. See also A. J. van den Berg, *New York Convention 1958. Commentary Cases Reported in Volume X*, 10 Y.B. COM. ARB. 335, 394-96 (1985) and references given in cumulative index, *id.* at 396.

York on December 10, 1981, for confirmation of the award.[14] It is here that dates become relevant. The C.P.L.R. of New York State requires that the petition be filed within *one* year after the arbitral award is made.[15] In contrast, the legislation

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[14] By a Judgment of Feb. 26, 1982, Bundesgericht, Switzerland, *reported in* 9 Y.B. COM. ARB. 437 (1984), the Swiss Federal Supreme Court rejected Muller's recourse. The Swiss Federal Supreme Court confirmed that no confirmation of the award by the courts in New York was needed for enforcement under the Convention.

[15] N.Y.CIV. PRAC. LAW § 7510 (McKinney 1980). The same applies to Chapter One of the Federal Arbitration Act: 9 U.S.C. § 9 (1982). Section 9 provides:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be nonresident, then the notice of the application shall be served by the marshal of any district within which the

implementing the New York Convention in the United States provides for a period of limitation of *three* years after the arbitral award is made.[16] The award was made on December 14, 1978. Consequently, the one year limitation period under the C.P.L.R. had expired. On the other hand, the time limit of three years under the implementing legislation had not (that is to say, only four days remained). Bergesen therefore based its petition on the implementing legislation.

The question which then arose before the district court and subsequently the court of appeals was whether enforcement of the award fell under the New York Convention and its implementing legislation.[17] If the award did, it could be

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> adverse party may be found in like manner as other process of the court.

Id.

[16] 9 U.S.C. § 207 (1982). Section 207 of the Federal Arbitration Act provides:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Id.

[17] The question was raised in some earlier court decisions in the United States. *See* National Metal Converters, Inc. v. I/S Stavborg, 500 F.2d 424 (2d Cir. 1974), *summarized in* 1 Y.B. COM. ARB. 201 (1976) (court did not apply the New York Convention to enforcement of an arbitral award, made in New York between US.

declared enforceable; if not, no enforcement could be granted. The award made in New York obviously did not qualify for the territorial criterion (that is, an arbitral award made in the territory of another State). But could it be considered as nondomestic, the second criterion of the Convention's field of application?

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and Norwegian party, but noted disagreement of commentators on the question); Transmarine Seaways Corp. v. Marc Rich & Co., A.G., 480 F. Supp. 352 (S.D.N.Y. 1979) (application of New York Convention to enforcement of arbitral award made in New York between Liberian and Swiss party), *aff'd mem.*, 614 F.2d 1291 (2d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980), *summarized in* 6 Y. B. COM. ARB. 244 (1981); Sumitomo Corp. v. Parakopi Compania Maritima, S.A., 477 F. Supp. 737, 738, 741 (S.D.N.Y. 1979) (action to compel arbitration agreed to take place in New York "in accordance with the rules of the United States Arbitration Act" between Japanese and Greek party, *held*, New York Convention applies as "had Congress also intended to exclude purely foreign transactions, it undoubtedly would have done so explicitly"), *aff'd*, 620 F.2d 286 (2d Cir. 1979), *summarized in* 6 Y.B. COM. ARB. 245 (1981); Marc Rich & Co., A.G. v. Andros Compania Maritima, S.A., 579 F.2d 691, 699 (2d Cir. 1978), *summarized in* 7 Y.B. COM. ARB. 373, 374 (1982) (court found the question whether the New York Convention applied to the enforcement of an arbitral award made in New York between Swiss and Panamanian party "intriguing" but did not resolve it); Diapulse Corporation of America v. Carba, Ltd., No. 78 Civ. 3263 (S.D.N.Y. June 28, 1979) (holding that where an arbitral award was made in New York between U.S. and Swiss party, the New York Convention does not apply to its enforcement as the award is not an "award not considered as domestic"), *remanded on other grounds*, 626 F.2d 1108 (2d Cir. 1980), *summarized in* 9 Y.B. COM. ARB. 461 (1984).

III. The Court of Appeals

The district court answered the latter question in the affirmative. It construed the New York Convention as implemented in the United States, "to apply to arbitration awards involving foreign interests and rendered in the United States."[18] Accordingly, it confirmed the award and entered judgement in Bergesen's favour.[19] The district court relied in particular on the implementing legislation which provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship "involves property abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.[20]

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[18] Bergesen v. Joseph Muller Corp., 548 F. Supp. 650, 651 (S.D.N.Y. 1982).

[19] *Id.*

[20] 9 U.S.C. § 202 (1982).

The court of appeals affirmed.[21] It examined in some detail the legislative history of the New York Convention. The court found that the original proposal to apply the Convention only to awards made in another country was controversial because the New York Conference delegates were divided as to whether it defined adequately what constituted a foreign award. On the one side were the Common Law and East European countries which favoured the territorial criterion as embodied in the original proposal. On the other side were certain Civil Law countries, such as France and the Federal Republic of Germany, in which the nationality of an award was determined by the law governing the procedure. On the basis of the proposition of a Working Group, both criteria were included in a compromise solution.[22]

The most important part of the court of appeals' reasoning can be considered the following:

> The Convention did not define nondomestic awards. The definition appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of "nondomestic" in conformity with its own national law. Omitting the definition made it easier for those states championing the territorial concept to ratify the Convention while at the same time making the Convention more palatable in those states which espoused the view that the nationality of the award

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[21] Bergesen v. Joseph Muller Corp., 710 F.2d 928, 934 (2d Cir. 1983).

[22] *Id.* at 930-32. *See infra* text accompanying notes 24-44.

> was to be determined by the law governing the arbitral procedure. We adopt the view that awards "not considered as domestic" denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. We prefer this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards, *see Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n. 15 (1974). Applying that purpose to this case involving two foreign entities leads to the conclusion that this award is not domestic.[23]

Regarding the implementing legislation, the court reasoned:

> The legislative history of this provision [i.e., 9 U.S.C. § 202 (1980), quoted above] indicates that it was intended to ensure that "an agreement or award arising out of a legal relationship exclusively between citizens of the United States is not enforceable under the Convention in [United States] courts unless it has a reasonable relation with a foreign state." H.R. Rep. No. 91-181, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3601, 3602. Inasmuch as it was apparently left to each state to define which awards were to be considered nondomestic, *see* Pisar at 18, Congress spelled out its

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[23] *Bergesen*, 710 F.2d at 932 (citations omitted).

definition of that concept in section 202. Had Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement by our courts it could readily have done so. It did not.[24]

IV. Legislative History

The New York Convention's history is recorded in Summary Records of the Conference held at New York in May and June 1958, at which the Convention was born.[25] To determine what the Convention's drafters may have intended by providing that the Convention also applies to nondomestic awards, the court of appeals relied on the reports of commentators.[26]

Before discussing the court of appeals' conclusions, however, it seems appropriate to examine the Summary

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[24] *Id.* at 933.

[25] The Summary Records are reprinted in Part III of INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION (G. Gaja ed. 1985).

[26] The commentators on which the court relied were: G. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE, MAY/JUNE 1958 (1958); Contini, *International Commercial Arbitration – The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 A.J. COMP. L. 283 (1958); Pisar, *The United Nations Convention on Foreign Arbitral Awards*, 33 S. CAL. L. REV. 14 (1959); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961).

Records themselves. The Draft of the Convention prepared by ECOSOC in 1955,[27] which formed the basis for the discussions at the New York Conference in May and June 1958, provided solely that the Convention was to apply to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State in which such awards are relied upon...."[28] Thus, what constituted a "foreign arbitral award" was, according to ECOSOC, to be determined by a territorial criterion.

At the beginning of the New York Conference, a number of delegates objected to the territorial criterion. The Italian delegate observed on May 21, 1958:

> [T]he Conference should reconsider the definition of the awards to which the Convention would apply. The mere fact that an award had been made in a country other than that in which it was sought to be relied upon was not enough to make it a foreign award from the point of view of the country of enforcement. The Conference should seek other criteria better suited to the purpose of the Convention, which was intended to facilitate the settlement of international commercial disputes.[29]

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[27] U.N. Doc. E/2704 and Corr. 1, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.A.1.1 (G. Gaja ed. 1985).

[28] *Id.*, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.A.1.7 (G. Gaja ed. 1985).

[29] U.N. Doc. E/CONF.26/SR.2, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.4 (G. Gaja ed. 1985).

The French delegate said on the same day: "The draft ... tended to attach an exaggerated importance to the place where the award was rendered. Practice had shown that the place of pronouncement was often an insignificant factor, and the prominence given to it in the draft tended to obscure the strictly private nature of the arbitration operation.[30] On May 22, 1958, the German delegate observed:

> If it was agreed that the place where the award was made should not be considered a determining factor – an opinion which he shared with the French representative – whether an award was to be regarded as national or foreign could be made dependent on the nationality of the parties, the subject of the dispute, or the rules of procedure applied. The last seemed to constitute the most appropriate determining factor. The nature, and hence the nationality, of an arbitral award would then be derived from the rules of procedure under which it had been made. Moreover, it should be noted that those rules depended to a large extent, at least in German law, on the will of the parties and, failing that, on the arbitral body itself; they were, however, governed to some extent by the procedure provided by the national legislation.[31]

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[30] U.N. Doc. E/CONF.26/SR.3, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.9 (G. Gaja ed. 1985).

[31] U.N. Doc. E/CONF.26/SR.4, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.C.16 - III.C.17 (G. Gaja ed. 1985). Before the Commencement of the Conference, the German Government had already observed that the criterion for determining the nationality of the award should be the procedural municipal law under which the award was made. Annex

On the same day Austria, Belgium, the Federal Republic of Germany, France, Italy, the Netherlands, Sweden and Switzerland submitted an amendment: "This Convention shall apply to the recognition and enforcement of arbitral awards other than those considered as domestic in the country in which they are relied upon."[32]

The French delegate explained this so-called Eight-Power amendment as follows:

> The place of the award was often fortuitous or artificial and, unlike the place of a court judgment, which was governed by unequivocal rules, might often prove difficult to determine. In certain extreme cases, for example when arbitral awards were agreed upon by correspondence between the arbitrators, it might prove quite impossible to determine it. Futhermore, as was shown by the ruling of the French Court of Cassation that an arbitration conducted under foreign law in Paris was not a French arbitration,[33] certain

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I, U.N. Doc. E/2822, *reprinted in* 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION at III.A.2.2-III.A.2.3 (G. Gaja ed. 1985).

[32] U.N. Doc. E/CONF.26/L.6, *reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.B.1.2 (G. Gaja ed. 1985).

[33] *See* P. FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL 323 *et seq.* (1961).

legal systems regarded the place where the award was made as only a secondary factor.[34]

Delegates of Guatemala, Israel, the United Kingdom and the United States noted that the Eight-Power amendment raised the difficulty that in their countries, and especially in Common Law countries, the place of arbitration determined whether an award was a foreign award. They found the territorial criterion "fully satisfactory."[35]

A number of delegates (Turkey, El Salvador, Argentina) also complained that the Eight-Power amendment left unanswered the question of what was not a domestic award. They understood it, in particular in view of the statements of the delegate from West Germany, to mean an award made in one country under the municipal procedural law of another country. The Italian delegate, who sponsored the Eight-Power amendment, recognized that the proposed amendment was incomplete.[36]

On the following day of the Conference, May 23, 1958, the West German delegate repeated that the territorial criterion was not satisfactory. He gave an example:

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[34] U.N. Doc. E/CONF.26/SR.5, *reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.C.28 (G. Gaja ed. 1985).

[35] *See, e.g., id., reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.C.28 (G. Gaja ed. 1985).

[36] *Id., reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.C.30 (G. Gaja ed. 1985).

> Two German businessmen residing in the United Kingdom submitted a dispute to arbitration; for that purpose they selected an arbitral tribunal sitting in London which consisted of German nationals and which followed German procedure. If the territorial criterion alone was considered, there could be no doubt about the nationality of the award: it would be an English award. That solution, however, did not seem right: since the German law of procedure had been applied, German law regarded that award as German; in addition, such a solution would have the effect of seriously infringing the autonomy of the will of the parties, which should be respected.[37]

The delegate of Colombia opposed the Eight-Power amendment by a statement which argued remarkably well the practical difficulties to which the criterion of nondomestic awards would lead. Although this statement is rather lengthy, it is worthwhile to quote the Summary Records extensively:

> The field of application of the Convention raised a fundamental problem. As the Federal Republic of Germany pointed out in its general observations..., the best solution would be for the internal laws of countries to be standardized by the adoption of a uniform law. Otherwise it would be necessary to find a criterion whereby it would be possible to specify to which arbitral awards the Convention was applicable. It was, indeed, most important that each signatory State should know exactly what the other States were

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[37] U.N. Doc. E/CONF.26/SR.6, *reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.C.40 (G. Gaja ed. 1985).

undertaking to do. It was for that reason that the Colombian delegation was not satisfied with the [E]ight-Power amendment .... The proposed criterion was much too vague. It was essential that an absolutely clear criterion, incapable of divergent interpretations, should be established. The Conference was called upon to draw up a Convention on the recognition and enforcement of certain so-called foreign awards, and the least it could do was to determine to which awards that Convention should be made applicable. In the case considered by the Federal Republic of Germany ..., the same award could be regarded as a national award by two different States, but that situation really provided a weighty argument against the over-vague formula set out in the [E]ight-Power amendment. If the Conference adopted that amendment, the signatories of the future Convention would not know the exact scope of the field of application of the Convention.

. . . .

The territorial criterion embodied in article I of the draft Convention had been criticized. The representative of the Federal Republic of Germany had cited examples in which an award made in the territory of a State other than that in which it was relied upon would nevertheless have to be regarded as domestic. The representative of France had criticized the territorial criterion on the grounds that it might be difficult to specify the place of the award, when, for example, such an award was made by correspondence. That, however, was an exceptional case. The arbitrators were obliged to discuss the question, to hear the parties and to deliberate, all of which factors made it necessary for the arbitral tribunal to have a

> permanent place of meeting. Even in the exceptional case of an award being made by correspondence, the place of the award could be determined, just as was, in all legislative systems, the place where a contract was entered into by correspondence. He therefore saw no valid objection to article I of the draft Convention. It was not perhaps perfect but it had the merit of providing a criterion and the obvious course seemed to be to entrust the task of improving it to a Working Group.[38]

The delegates from Israel, Guatemala, Japan, Norway, Poland and the U.S.S.R. concurred in this criticism. The Conference then decided to refer the matter to a Working Group composed of delegates from Colombia, Czechoslovakia, France, the Federal Republic of Germany, India, Israel, Italy, Turkey, the U.S.S.R. and the United Kingdom.[39]

The Working Group submitted its report on June 2, 1958.[40] In the report, the Working Group noted that, with respect to the scope of application of the Convention, the views of the Governments represented at the Conference fell mainly into two categories: (a) those favouring the principle

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[38] *Id.*, *reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.C.41-III.C.42 (G. Gaja ed. 1985).

[39] U.N. Doc. E/CONF.26/SR.7, *reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.C.51 (G. Gaja ed. 1985).

[40] U.N. Doc. E/CONF.26/L.42, *reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.B.4.1 (G. Gaja ed. 1985).

of the place of arbitration, and (b) those favouring the principle of nationality of the arbitral award. "In an attempt to reconcile these divergent views" (no further explanation was given) the Working Party proposed a text, embodying both criteria, which is essentially the same as the present text of article I(1) of the Convention:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of disputes or differences between physical or legal persons. It shall also apply to arbitral awards not considered as domestic awards in the State where the recognition and enforcement are sought.[41]

The Working Group's proposal was subject to a summary discussion at the Plenary Session on June 3, 1958.[42] The Yugoslavian delegate considered that the proposal "combined the territorial criterion with other criteria." The Japanese delegate stated that his country preferred the territorial criterion to any other connecting factor, but noted "with satisfaction that the proposed text would have the effect of extending the scope of the Convention." The Italian delegate confirmed that "the Working Group had wished to make the scope of the Convention broader," and did not even exclude "awards made abroad when they were regarded as domestic by the country in which enforcement was sought." The

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[41] *Id.*, *reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.B.4.2 (G. Gaja ed. 1985).

[42] U.N. Doc. E/CONF.26/SR.16, *reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.C.130 (G. Gaja ed. 1985).

proposal of the Working Group was adopted by thirty-five votes to none with three abstentions.

When the final text of the New York Convention was reviewed for adoption on June 9, 1958, two amendments were made which have a bearing on the concept of a nondomestic award.[43] With respect to the arbitration agreement, the text provided that enforcement of the award could be refused if the arbitration agreement were invalid "under the law applicable to it." This was amended to read: "under the law *to which the parties have subjected it* or, failing any indication thereon, under the law of the country where the award was made.[44] An even more significant amendment was made in respect of the arbitral award: the text provided that enforcement of the award could be refused if the award had been set aside in the country in which it was made." This was amended to read: "of the country in which, *or under the law of which,* that award was made.[45] The underscored amendments recognize the possibility that an arbitral award is governed by an arbitration law which is different from the law of the place of arbitration.[46]

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[43] U.N. Doc. E/CONF.26/SR.23, *reprinted in* 1 INTERNATIONAL ARBITRATION: NEW YORK CONVENTION at III.C.207, III.C.213 (G. Gaja ed. 1985).

[44] New York Convention, *supra* note 1, art. V(1)(a) (emphasis added).

[45] New York Convention, *supra* note 1, art. V(1)(a) (emphasis added).

[46] However, article V(1)(d) of the New York Convention remained unchanged. This provision reads:

1. Recognition and enforcement of the award may be

V. The Conventional Interpretation

A. First Criterion Always Applies to an Award Made Abroad

The court of appeals in *Bergesen v. Muller* stated that the New York Convention applies *in any case* to the recognition and enforcement of an arbitral award made in the territory of another State.[47] This observation conforms to the legislative

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> refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> . . . .
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

New York Convention, *supra* note 1, art. V(1)(d). For historical reasons, article V(1)(d), having been hotly debated, had become "untouchable." *See generally* VAN DEN BERG, *supra* note 12, at 322-25.

[47] Muller also argued that the first reservation made by the United States in virtue of article I(3), New York Convention, *supra* note 1, i.e., that the United States shall apply the New York Convention to the enforcement of arbitral awards made in other *Contracting States* only, forecloses the application of the second criterion by U.S. courts. Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983). The court of appeals rejected this argument, stating simply that "the treaty language should be interpreted broadly to effectuate its recognition and enforcement purposes." *Id.* at 933. The court of appeals is indeed correct in holding that the use of the first reservation does not confine the New York Convention's

history reviewed above. In fact, the compromise reached at the New York Conference was in favour of the territorialists. The nondomestic award laid down in the second criterion was intended as an extension of the New York Convention's field of application. This is also made clear in the text of the New York Convention itself. The second criterion provides: "It shall *also* apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[48] In other words, the New York Convention always applies to the recognition and enforcement of an arbitral award made in another State (that the first criterion), whilst it may, in addition, apply to the recognition and enforcement of an arbitral award made in the State where the recognition and enforcement are sought if such an award is considered nondomestic (i.e., the second criterion). As a result, *the second criterion of the Convention's scope applies only to the recognition and enforcement of an arbitral award made in the territory of the state where recognition and enforcement are sought*.

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applicability to the first criterion. The reciprocity idea underlying the first reservation is that a State wishes to enforce awards made in other *Contracting States* only because these States have expressed their willingness to enforce awards made in the own State by adhering to the New York Convention. The reciprocity idea underlying the first reservation can be deemed to apply by analogy to the second criterion. Accordingly, if the first reservation is used, the second criterion can be deemed to be limited to awards rendered in the own State under the arbitration law of another *Contracting State* only. *See* VAN DEN BERG, *supra* note 12, at 27.

[48] New York Convention, *supra* note 1, art. I(I) (emphasis added).

When such an award is to be considered nondomestic according to what may be called the conventional interpretation will be discussed in Section D hereafter. Before entering into this discussion, a consequence of the fact that the first criterion always applies to an award made abroad should be mentioned in connection with the law implementing the Convention in the Federal Republic of Germany (see Section B below). Further, in order to appreciate the New York Convention's scope in relation to the nondomestic award, it is also necessary to make some observations regarding the distinction between recognition and enforcement on the one hand and setting aside on the other.

B. The West German Implementing Law

The rule that the New York Convention is always applicable to the recognition and enforcement of an arbitral award made abroad applies even if the award made in the other country is considered domestic by the enforcing court. The West German law implementing the Convention confirms this:

> (1) If an arbitral award falling under the Convention is made in another Contracting State under German procedural law, then the request for the setting aside of this award can be made in the Federal Republic of Germany. The setting aside is governed by §§ 1041, 1043, 1045(1) and 1046 of the Code of Civil Procedure. (2) If the request for enforcement of an award within the meaning of paragraph (1) is refused by virtue of Article V of the Convention, then the award shall be set aside at the same time in case one

of the grounds for setting aside set forth in § 1041 of the Code of Civil Procedure is present.[49]

The provision quoted above caters to the situation where an arbitral award is made in another State. If such an award is made under German procedural law (that is German arbitration law), that award is considered domestic in West Germany. In conformity with the rule that under the Convention's first criterion the Convention always applies to an award made abroad, the German law provides that the aforementioned award, though being considered domestic, falls under the New York Convention. The German law also refers to the setting aside of such award, which reference needs to be explained in the following subsection.

C. Distinction Between Enforcement and Setting Aside

The above-mentioned German implementing law provides that an arbitral award made abroad under German procedural law can be set aside under the latter law. This raises the question about the role played by the setting aside of an award within the framework of the Convention.

As a general rule, whilst recognition and enforcement merely have a territorial effect, setting aside has, according to the Convention, an extra-territorial effect.

When a court recognises and enforces an arbitral award, whether made within its territory or abroad, it accepts that the

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[49] Law of Mar. 15, 1961, § 2, Bundesgesetzblatt [BGBl] II, 121 (W. Ger.). There seems not to be any other implementing law which deals with the second criterion.

award has the same force and effect within its jurisdiction. The legal basis for recognition and enforcement for an arbitral award made within a court's jurisdiction is to be found in the arbitration law of that jurisdiction. For the recognition and enforcement of a foreign arbitral award, the legal basis is the New York Convention or, if it exists, municipal law regarding the recognition and enforcement of a foreign arbitral award.[50] The granting or refusal of recognition and enforcement is territorially limited to the court's jurisdiction. A foreign court is not bound by a granting or refusal of recognition and enforcement by a court of another country, because neither is listed in the Convention as a ground for which recognition or enforcement must be respectively granted or refused.[51]

Different rules apply, according to the New York Convention, to the setting aside (also called vacatur or annulment) of the arbitral award. First, the court of the country in which, or under the law of which, the award is made ("country of origin") is exclusively competent to entertain the action for setting aside the award. A foreign court may not entertain such an action. The Convention specifically refers to a setting aside by the court of the country of origin only.[52] A foreign court may only refuse recognition and enforcement of an arbitral award within its jurisdiction if one or more of the grounds of refusal for recognition and

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[50] *See, e.g.*, ZIVILPROZESSORDNUNG [ZPO] art. 1044 (W. Ger.) (German Code of Civil Procedure). *See generally* Glossner, *National Report Federal Republic of Germany*, 4 Y.B. COM. ARB. 60, 79 (1979).

[51] New York Convention, *supra* note 1, art. V(1)(e).

[52] New York Convention, *supra* note 1, art. V(1)(e).

enforcement are present.[53] Second, if the arbitral award has been set aside in the country of origin, foreign courts are bound by that decision, In that case they must refuse recognition and enforcement of the award.[54]

An example may clarify the above distinction between the recognition and enforcement of an arbitral award on the one hand, and the setting aside of an award on the other. An arbitral award made in France under French arbitration law can be set aside by a French court only. Foreign courts may merely refuse recognition and enforcement of that award within their jurisdiction, but not set it aside. However, if a Swiss court has refused recognition and enforcement of the French award, an Italian court is not bound by such refusal and may still grant recognition and enforcement. Such conflicting decisions are rare in practice. If the French courts have set aside the award, the Swiss and Italian courts must refuse the recognition and enforcement.

The West German law quoted above is concerned with an award made in another country under German procedural law. If the award is made under German procedural law, German

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[53] New York Convention, *supra* note 1, art. V(l)(e). It is a well established principle that the grounds of refusal for recognition and enforcement listed in article V of the New York Convention are exhaustive. *See* VAN DEN BERG, *supra* note 12, at 265.

[54] New York Convention, *supra* note 1, art V(1)(e). It should be noted that in the case where the arbitral award is refused recognition and enforcement in the country of origin, it is not always clear whether such refusal is a genuine refusal of recognition and enforcement or is in fact tantamount to a setting aside.

courts consider the award to be domestic. West Germany therefore is the country "under the law of which" the award is made, in other words, the country of origin. The West German law rightly provides that the West German courts are competent to decide on the setting aside of the award.

D. Nondomestic is Determined by the Applicable Arbitration Law

We may now return to the question when an award is to be considered nondomestic under the New York Convention. As explained in (A) above, the second criterion of the Convention's scope applies only to an arbitral award made in the territory of the country where recognition and enforcement are sought.

The legislative history shows that its supporters considered an award as nondomestic if it is governed, on the basis of an agreement of the parties to this effect, by the arbitration law of another country. For example, parties may agree to arbitrate in France on the basis of West German arbitration law. French courts will consider the award as nondomestic and hence enforce the award under the Convention although it is made within their own territory. The above quoted West German implementing law confirms that whether an award is to be considered nondomestic depends on the arbitration law applicable to the arbitration as it refers to "an arbitral award ... made in another Contracting State under German procedural law.[55] Although the text of the law is written for German awards made abroad, the reference to German municipal procedural law indicates that if an award is made

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[55] Law of Mar. 15, 1961, § 2, BGBl II, 121 (W. Ger.).

within West Germany under a foreign procedural law, such award is to be considered as nondomestic in West Germany.

The foregoing interpretation can be called the conventional interpretation. This interpretation is not only based on the legislative history of the Convention but is also confirmed by the text of the Convention. The Convention refers to arbitral awards not only made in another country but also under the law of another country.[56] If the Convention's field of application consisted of arbitral awards made in another State only, there was no need to refer to awards made under the law of a country. This aspect will be discussed below.[57] It should be noted that most commentators outside the United States have affirmed that the nondomestic arbitral award is an award made in the enforcing State under the arbitration law of another State.[58]

In practice, however, parties rarely agree to arbitrate in one country under the arbitration law of another country. Such agreement is a rather hazardous undertaking because both the country where the arbitration takes place and the country whose arbitration law is chosen should recognise the capacity to agree to arbitrate under the law of a country which is different from the country where the arbitration takes place. The law governing the arbitration determines which country's courts are competent to render assistance in the arbitration, for example the appointment of arbitrators. That law also determines which country's courts are competent to exercise

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[56] New York Convention, *supra* note 1, art. V(1)(e).

[57] *See infra* text accompanying note 80.

[58] *E.g.*, K.H. SCHWAB, SCHIEDSGERICHTSBARKEIT 320 (3d ed. 1979).

control over the regularity of the arbitration and arbitral award, ordinarily carried out in an action for setting aside the award. If the parties agree to arbitrate in country *A* under the arbitration of country *B*, it may happen that country *A* does not recognise the capacity to designate a foreign arbitration law. In such a case, the courts in country *A* will hold the award made within its territory to be domestic and consequently will hold themselves competent to entertain, for instance, the action for setting aside the award. But if, at the same time, country *B* allows arbitration abroad under its arbitration law, its courts will also consider the award to be domestic and may hold themselves equally competent to entertain an action for setting aside the award. This may end up in an undesirable situation where the courts of two countries decide on the setting aside of the award, with possible conflicting decisions. The reverse situation may be equally undesirable: if country A recognises the capacity, but country *B* does not allow arbitration abroad under its arbitration law, the setting aside cannot be sought in either country.

E. Place of Arbitration

It is submitted that there is also no need to agree to arbitrate in one country under the arbitration law of another country. The proper position is, and the delegates of the above referenced civil law countries seemed to have failed to appreciate this, that *the parties have the freedom to designate the applicable arbitration law by designating the place of arbitration.*

Some confusion continues to exist in the literature regarding the question of what should be understood by the

place of arbitration.[59] A distinction must be made between the place of arbitration in its legal sense and the place of arbitration in its physical sense. Normally, both senses coincide, but in international arbitration this is not necessarily so.

The place of arbitration in the legal sense (also called "seat of arbitration") means that the arbitration law of the country where the arbitration takes place governs the arbitration. The place of arbitration in this sense is determined by the parties in their arbitration agreement. For example, the parties may include a clause in their agreement stating: "The place of arbitration shall be X." The parties may also leave determination of the place of arbitration to a third party, which is usually the arbitration institution administering the arbitration under its arbitration rules, as referred to in the arbitration agreement. If neither the parties nor a third party has determined the place of arbitration, it can be determined by the arbitrators themselves. It is the place of arbitration in the legal sense which must be mentioned in the arbitral award as the place where the award is made. This reference almost invariably appears just above the arbitrators' signature in conjunction with the date of the award.

The place of arbitration in the physical sense connotes the place or places where the hearing is held, where the arbitrators administer evidence, and where the arbitrators deliberate and sign the award. These meetings may occur at any place where it is appropriate, under the circumstances of

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[59] *See* Mann, *Where is an Award "Made"?*, 1 ARB. INT'L 107 (1985).

the case, or which is convenient to the parties and the arbitrators.

Therefore, it may happen, for instance, that the place of arbitration in the legal sense is Stockholm, but that the hearings are held in Cairo and New York and that the arbitrators sign the award at their respective domiciles in other countries. In such a case, the award will merely mention that it is "made" in Stockholm. Such mention is in turn sufficient for determining whether arbitral awards are "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought,"[60] the first criterion of the Convention's field of application. It should be observed that the question of where the award was "made" has not given rise to any difficulty in any of the more than 250 court decisions in which the New York Convention has been applied to date, as reported in the *Yearbook Commercial Arbitration*, Volumes I (1976) - X (1985).

VI. The Expansive Interpretation by the Court of Appeals

A. The Court of Appeals' Interpretation

If the foregoing interpretation, based on the legislative history and text of the Convention, is applied to the *Bergesen v. Muller* case, the conclusion must be that the award was not a nondomestic award within the meaning of the New York Convention. The arbitration clause provided expressly that "the arbitration ... shall be governed by the Laws of the State of New York ...." The reference to the laws of the state of New York must be deemed a reference to New York state

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[60] New York Convention, *supra* note I, art. I(1).

arbitration law. Even if this reference is construed as a reference to the law applicable to the substance, that is, the law to be applied by the arbitrators to the merits of the dispute, the *Bergesen v. Muller* arbitration was not governed by the arbitration law of another Contracting State because there was no indication that the parties expressly or implicitly agreed to a foreign arbitration law.

The court of appeals, therefore, went beyond the legislative history and text of the Convention. If the second criterion of nondomestic awards is read in isolation, a court can be deemed to be free to do so because the text gives a court a discretionary power: the Convention can be applied to an arbitral award if a court *"considers"* it nondomestic.[61] The reason the court of appeals preferred the "broader construction" was that "it is more in line with the intended purpose of the treaty."[62] The court described the purpose as being "to encourage the recognition and enforcement of international arbitration awards."[63] It referred in this respect to the famous decision of the U.S. Supreme Court in *Scherk v. Alberto Culver* Co.[64] One cannot but approve this reason.

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[61] VAN DEN BERG, *supra* note 12, at 25-27.

[62] Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983).

[63] *Id.*

[64] Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974). In *Scherk*, the Supreme Court observed:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international

Whether the "broader construction" can be based on a reading of the second criterion in isolation, however, needs further examination.

The court of appeals interpreted awards "not considered as domestic" to be awards which are "made within the legal framework of another country." It gave as examples of "the legal framework of another country," awards which are "pronounced in accordance with foreign law" or which involve "parties domiciled or having their principal place of business outside the enforcing jurisdiction.[65] The reference by the court of appeals to "the legal framework of another country" is at first sight somewhat puzzling. The examples given by the court of awards "pronounced in accordance with foreign law" is equally mystifying. Does the foreign law mean the law applicable to the arbitration or the law applicable to the substance, or both? What the court presumably had in mind was that the award involved some foreign contact. Such contact could be either the law applicable to the arbitration or the law applicable to the substance. Neither contact was present in the *Bergesen v. Muller* case. As observed before, the arbitration clause referred to New York state law.

B. The Parties' Nationality

What really motivated the court of appeals to hold the award to be nondomestic was the foreign nationality of both parties involved (Norwegian and Swiss). This consideration

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> contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Id. at 520 n.15.

[65] *Bergesen*, 710 F.2d at 932.

is not in accordance with the New York Convention, as far as the first criterion for its field of application is concerned. The Convention's scope does not depend on the nationality of the parties. Such a condition was imposed by the Geneva Convention of 1927, the New York Convention's predecessor, which required that the parties be subject to the jurisdiction of different Contracting States.[66] The expression "subject to the jurisdiction" of a State had caused uncertainty, as some courts interpreted it as referring to nationality, while others construed it as domicile.[67] Consequently, the nationality requirement was left out of the New York Convention. The New York Convention, therefore, applies in theory to the enforcement of an arbitral award made in another country between two nationals of the enforcing State. The Italian Supreme Court, for example, has recognized this rule and held that it supersedes the principle of Italian law that two Italians are not allowed to arbitrate abroad.[68]

As far as the first criterion (awards made abroad) is concerned, the foreign nationality of the parties is not a condition for the New York Convention's applicability. But can the foreign nationality of the parties trigger the applicability of the second criterion (that is, nondomestic awards made within the enforcing State)? The second criterion read in isolation would permit a court to do so because, as observed before, it gives a court discretionary power whether or not to regard an award as nondomestic. Although

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[66] Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, art. I, 92 L.N.T.S. 302 (1929-1930).

[67] *See generally* VAN DEN BERG, *supra* note 12, at 15-17

[68] Judgment of Dec. 13, 1971, Courte di Cassazione, Italy, No. 3620, *summarized in* 1 Y.B. COM. ARB. 190 (1976).

according to the conventional interpretation, a nondomestic award is an award made in the enforcing State under the arbitration law of another State, a court may go further and regard an award nondomestic because of the foreign nationality of the parties regardless of the applicable arbitration law. Such an expansive interpretation is apparently adopted by the court of appeals in *Bergesen v. Muller.*

C. The U.S. Implementing Legislation

The court of appeals obviously came to this broader construction on the basis of the legislation implementing the New York Convention in the United States. The court referred to the provision by which the New York Convention should not apply to an agreement or award arising out of a legal relationship exclusively between citizens of the United States, unless that relationship has some reasonable relation with one or more foreign States.[69] The court then stated that Congress spelled out its definition of nondomestic awards in the just mentioned provision.

When examining the legislative history of the implementing legislation, it appears that its drafters were not concerned with a definition of a nondomestic award within the meaning of the Convention. Their concern was:

> [W]e were faced with the problem that section 1 of the [Federal Arbitration] Act, which defines commerce, specifically includes both interstate and foreign commerce, while the implementation of the

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[69] 9 U.S.C. § 202 (1982) (set forth in full *supra* in text accompanying note 20).

> Convention should be concerned only with foreign commerce. Consequently, it was necessary to modify the definition of commerce to make it quite clear that arbitration arising out of relationships in interstate commerce remains under the original Arbitration Act and is excluded from the operation of the proposed chapter 2.
>
> To achieve this result we have included in section 202 the requirement that any case concerning an agreement or award solely between U.S. citizens is excluded unless there is some important foreign element involved ....[70]

In other words, the drafters were concerned about a delineation of the ambit of Chapter One and Chapter Two of the Federal Arbitration Act. The legislative history nowhere suggests that the provision was intended to be a definition of nondomestic awards.

The core of the problem seems to be that, in an arbitration between two aliens within the United States, it is often difficult, if not impossible, for these parties to obtain jurisdiction in the federal courts under Chapter One of the Federal Arbitration Act with regard to matters connected with the arbitration. Chapter One does not create an independent basis for federal jurisdiction.[71] Two aliens cannot satisfy the

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[70] S. Rep. No. 702, 91st Cong., 2d Sess. 6 (1970) (statement of Mr. R.D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law).

[71] Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *dismissed pursuant to stipulation*, 364 U.S. 801 (1960).

requirement of diversity jurisdiction which requires that at least one of the parties be a citizen of the United States.[72] The Implementing legislation, Chapter Two of the Federal Arbitration Act, has cured this unsatisfactory situation. It provides for original jurisdiction of the federal courts in an "action or proceeding falling under the Convention."[73] The diversity requirement does not apply in this case. Although the court of appeals did not explicitly mention the problems caused by Chapter One for two foreign parties arbitrating within the United States, it did indeed refer to the provision in Chapter Two, creating original jurisdiction, in support of its view that awards rendered in the United States may qualify for enforcement under the Convention.[74]

Viewed within this perspective, the interpretation by the court of appeals makes the United States a more hospitable forum for foreign parties intending to arbitrate within the United States. They can now be assured that the ensuing award can be enforced in the federal courts. However, the legal basis is scant. Neither the text nor the legislative history of the Convention indicate that recognition and enforcement of an award made between two foreign parties under the arbitration law of the country in which recognition and

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[72] 28 U.S.C. § 1332 (1980).

[73] 9 U.S.C. § 203 (1982). Section 203 of the Federal Arbitration Act provides: An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 98) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

[74] *Bergesen*, 710 F.2d at 933.

enforcement are sought should be deemed to fall under the Convention. The same applies to the legislative history of the U.S. implementing legislation. Even the provision relating to the original jurisdiction of the federal courts in the implementing legislation cannot be deemed to constitute an indication to this effect. That provision can be invoked only if the award falls under the Convention. In fact, a legal basis can be found only if the text of the second criterion is read in isolation. As mentioned, that text gives courts in Contracting States a discretionary power to consider awards made within their jurisdiction as nondomestic. But can the text of the second criterion be read in isolation?

D. The New York Convention's Scope Regarding the Referral to Arbitration

Before answering the latter question, another argument of the court of appeals should be discussed. That argument runs as follows: "It would be anomalous to hold that a district court could direct two aliens to arbitration within the United States under the statute [Chapter Two of the Federal Arbitration Act], but that it could not enforce the resulting award under legislation which, in large part, was enacted for just that purpose."[75]

The court referred to a provision in the implementing legislation according to which a U.S. court may direct that arbitration be held at any place provided for in the arbitration agreement "whether that place is within or without the United

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[75] *Id.*

States."[76] That provision requires some explanation. The Convention not only provides for the enforcement of foreign arbitral awards but also for the referral to arbitration:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[77]

The difficulty is that the Convention does not give a definition as to which arbitration agreements fall under the above quoted provision. At the New York Conference in 1958, the question of the New York Convention's scope in respect of the arbitration agreement was not discussed at all. This omission is due to the last-minute insertion of the provision into the Convention.

A number of courts in the Contracting States and some of the implementing acts have solved the omission by interpreting the provision by analogy to the Convention's definition for its scope in respect of arbitral awards. Accordingly, the provision can be deemed to be applicable to an agreement providing for arbitration in another State. Two

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[76] 9 U.S.C. § 206 (1982). Section 206 of the Federal Arbitration Act provides: "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement." *Id.*

[77] New York Convention, *supra* note 1, art. II(3).

other categories of arbitration agreements pose more problems: an agreement providing for arbitration within the State in which it is invoked and one failing to indicate the place of arbitration. It is clear that the provision should not apply to purely domestic arbitration agreements. Possible conditions for the application of the provision in these two cases can be (a) foreign nationality of at least one of the parties, or (b) an international or foreign element connected with the contract to which the arbitration agreement relates.[78] Reliance on these conditions is justified by the aforementioned purpose of the Convention.

The U.S. implementing legislation is one of the laws which can be deemed to compensate for the omission. In essence it implies that an arbitration agreement can be enforced under the Convention if at least one of the parties is non-American, irrespective of whether the place of arbitration is within or without the United States. It also implies that enforcement of an arbitration agreement between two U.S. citizens can take place under the Convention, if the underlying transaction has some reasonable relation with one or more foreign States.[79]

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[78] *See generally* VAN DEN BERG, *supra* note 12, at 56-71 (discussing which arbitration agreements are within the scope of article II(3) of the New York Convention).

[79] Fuller Company v. Compagnie des Bauxites de Guinee, 421 F. Supp. 938, 941 (W.D. Pa. 1976). In determining whether the court had jurisdiction to compel arbitration under 9 U.S.C. §§ 201-208, the court stated that the jurisdictional requirements would be met if *"any one"* of the four conditions mentioned in § 202 were met, *viz.*: (1) the agreement involves property located abroad, (2) the agreement envisages performance abroad, (3) the agreement envisages enforcement abroad, or (4) the agreement has some other

E. Second Criterion Cannot Be Read in Isolation

The enforcement of the arbitration *agreement* under the New York Convention is one thing, the enforcement of an arbitral *award,* however, is quite another. The difference lies in the fact that the Convention's scope is not defined at all with respect to the arbitration agreement while the Convention does so in respect of the arbitral award. In view of the Convention's silence with respect to the arbitration agreement, an expansive interpretation, on the basis of conditions such as the foreign nationality of the parties, is justified by relying on the Convention's purpose. Regarding the arbitral award, the Convention does state that it applies to an arbitral award made in another State. The Convention's application to the nondomestic award appears to be possible only if the award is made in the enforcing State under the arbitration law of another country. An interpretation expanding the nondomestic awards to an award made in the enforcing State between foreign nationals under the State's own arbitration law does not fit into the other provisions of the Convention. Considering these provisions, it does not seem correct to interpret the second criterion in isolation. The provisions relating to the grounds for refusal of enforcement of an arbitral award are obviously written for arbitral awards made in another State or under the arbitration law of another State. This becomes particularly evident when considering the ground that the award "has been set aside or suspended by a competent authority of the country in which, or under the law

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reasonable relation with one or more foreign States. *See also* VAN DEN BERG, *supra* note 12, at 67-69.

of which, that award was made."[80] The expansive interpretation by the court of appeals can be maintained only if the word "country" in this provision is stretched to include the country in which the award is made (that is the United States). It is submitted that such interpretation is contrary to the clear meaning of the Convention's text.

The result can indeed be that a court is obliged to refer parties to arbitration within its jurisdiction pursuant to the Convention, but that enforcement of the ensuing award cannot be based on the Convention if such enforcement is sought in the same jurisdiction. This result is not so anomalous as it may appear at first sight. The Convention is an instrument which supports two aspects of international arbitration only. All other aspects are governed by the applicable arbitration law. Moreover, as will be explained below, enforcement of an award under domestic law will usually be easier than enforcement under the Convention. Furthermore, if enforcement of the arbitration agreement under the Convention would be more difficult than enforcement under domestic law (for instance, because the arbitration agreement does not comply with the formal requirements of the Convention), a party can still rely on domestic law by virtue of the Convention's more-favourable-right-provision. That provision, drafted for the enforcement of the arbitral award, can be deemed to apply by analogy to the enforcement of the arbitration agreement.[81]

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[80] New York Convention, *supra* note 1, art. V(1)(e). *See also id.* at art. V(1)(a).

[81] *See* VAN DEN BERG, *supra* note 12, at 86-87.

The expansive interpretation given by the court of appeals to the second criterion of the Convention's field of application is understandable in view of the fact that the implementing legislation defines without distinction the enforcement of the arbitration agreement and arbitral award in the same provision.[82] The provision is, in fact, inserted to prevent two U.S. citizens arbitrating outside the United States in respect of a purely domestic (U.S.) affair. The reservation included in the U.S. implementing legislation is inspired by the Uniform Commercial Code, according to which parties may designate the law of another state or of a foreign country as governing their transaction only if the transaction bears a reasonable relation with that state or country.[83] However, considering the foregoing, the provision seems to be incompatible with the Convention as far as the arbitral award is concerned. As mentioned, the Convention does not impose the nationality of the parties as a requirement for its applicability to the arbitral award and does not limit its scope to international commerce.[84] The Convention allows, in theory, two nationals of the same nationality to arbitrate abroad on a domestic transaction. Parties may wish to do so when the arbitration, law of their country is unfavourable or when the country in question does not have arbitration institutions for adequate administration of arbitration (neither situation applies to the United States in general). This situation must be distinguished from the situation where parties of the same nationality arbitrate abroad with the purpose of evading

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[82] 9 U.S.C. § 202 (1982) (set forth in full in *supra* text accompanying note 20).

[83] U.C.C. § 1-105(1) (1977). *See*, S. REP. No. 702, 91st Cong., 2d Sess. 6 (1970).

[84] *See* VAN DEN BERG, *supra* note 12, at 17-18.

mandatory law (for example tax laws). In such a case, enforcement may be refused under the public policy provisions of the Convention.[85]

VII. Consequences of the Expansive Interpretation

A. Enforcement of an Arbitral Award in the United States More Cumbersome

If the expansive interpretation is followed, enforcement of an arbitral award containing a foreign element and made in the United States, may become more difficult. Enforcement of an award falling under Chapter One of the Federal Arbitration Act is almost automatic.[86] Objections to an award must be raised through an action for setting aside the award. The same applies to the arbitration laws of most of the constituent states of the United States.[87] In contrast, enforcement of an award under Chapter Two of the Federal Arbitration Act and the Convention can be resisted on a number of grounds.[88] Many

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[85] New York Convention, *supra* note 1, art. V(2)(b).

[86] *See* 9 U.S.C. § 9 (1982) (set forth in full in *supra* note 15); Feldman is of the opinion that "the legal regime applicable to domestic arbitration in many states party to the New York Convention is significantly less liberal than the regime applicable to the enforcement of 'foreign' arbitral awards". Feldman, *An Award Made in New York Can Be a Foreign Arbitral Award*, 39 ARB. J. 14, 18-19 (1984). A review of the 59 National Reports sub 10 ("Enforcement") in the YEARBOOK COMMERCIAL ARBITRATION (1976-1985) does not support Mr. Feldman's supposition as far as the enforcement of domestic awards is concerned.

[87] *See* UNIF. ARBITRATION ACT § 11, 7 U.L.A. 133 (1956).

[88] New York Convention, *supra* note 1, art. V.

of these grounds for refusal of enforcement correspond in essence to the grounds for setting aside under Chapter One of the Federal Arbitration Act[89] and most of the arbitration laws of constituent states.[90]

One is then faced with the rather undesirable situation where the same award may be subject to resistance by a losing party on the basis of similar grounds in two different procedures. First, in proceedings initiated by the winning party aiming at the enforcement of the award under Chapter Two of the Federal Arbitration Act and the Convention, the losing party can invoke all grounds for refusal of enforcement listed in the Convention. Second, in proceedings initiated by the losing party aiming at the setting aside of the award under Chapter One of the Federal Arbitration Act or under state arbitration law, the losing party can assert grounds for setting aside the award which are similar to the Convention's grounds for refusal of recognition and enforcement.

It may be argued that the doctrine of collateral estoppel controls this situation and that a losing party is estopped from challenging the award in the second procedure if he has already asserted these grounds in a first procedure. However, an action for the enforcement is essentially different from an action for the setting aside of the award. As mentioned before, this distinction is clearly made by the Convention itself. In addition, the grounds for refusal of enforcement under the Convention are not identical to, but only similar (in most cases) to the grounds for setting aside under federal and state arbitration law.

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[89] *See* 9 U.S.C. § 10 (1982).

[90] *See* UNIF. ARBITRATION ACT § 12, 7 U.L.A. 140 (1956).

B. Arbitration Agreement in Writing

The Convention requires that the arbitration agreement be in writing. This requirement is defined in the Convention as "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[91]

The Convention's requirement of a writing is more stringent than that of the Federal Arbitration Act and the arbitration laws of most of the constituent states of the United States. It means that if the underlying arbitration agreement does not comply with the requirement of the Convention, enforcement pursuant to Chapter Two of the Federal Arbitration Act and the Convention must be refused if the award has a foreign element, while a comparable award can be enforced under Chapter One of the Federal Arbitration Act or state law if it is purely domestic, notwithstanding the fact that both awards are made inside the United States.

C. More-Favourable-Right-Provision

If the expansive interpretation is maintained, the problems described above can be solved by relying on the more-favourable-right-provision of the Convention:

> The provisions of the present Convention shall not... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the

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[91] New York Convention, *supra* note I, art. II(2).

country where such award is sought to be relied upon.[92]

This provision gives a party the freedom to base his request for enforcement on the domestic law concerning the enforcement of the foreign awards. For an award rendered in the United States which is considered nondomestic, it would mean that the enforcement can be based on Chapter One of the Federal Arbitration Act or the arbitration law of the state in which enforcement is sought. If these bases are not sound, the enforcement may be based on the case law under which foreign awards are enforced outside a multilateral or bilateral treaty in the United States.[93]

The above scheme is not only cumbersome, it may also create problems for enforcement abroad as will be demonstrated in the following subsection.

D. Problems for Foreign Courts

The expansive interpretation may cause problems for foreign courts. The Federal Supreme Court of the Federal Republic of Germany already doubted, in connection with the request for enforcement of an arbitral award rendered in New York State in an arbitration between Swiss and German parties, whether the United States has unilaterally enlarged the

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[92] New York Convention, *supra* note 1, art. VII(1). *See generally* VAN DEN BERG, *supra* note 12, at 82-86.

[93] Gilbert v. Burnstine, 225 N.Y. 348, 174 N.E. 706 (1931). *See* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 45:02 (Rev. Ed. 1985).

New York Convention's field of application.[94] In this case, the arbitration agreement did not comply with the requirements of the Convention.[95] In light of the more-favourable-right-provision of the Convention,[96] the enforcement was then based on German domestic law concerning the enforcement of foreign arbitral awards.[97] Under that law, the validity of the arbitration agreement was to be determined under the law of the place of rendition. The German Supreme Court referred, in this respect, to the opinion of a German commentator that the United States has unilaterally enlarged the Convention's field of application to the effect that the Convention applies to all arbitration agreements and arbitral awards which are considered commercial and which do not concern relationships that are entirely between citizens of the United States.[98] The German Supreme Court did not decide this issue for reasons which are not relevant here.

The opinion of the German commentator can be deemed to correspond to the expansive interpretation by the court of appeals in *Bergesen v. Muller*. If *Bergesen* were followed, there could be extraordinary consequences to the enforcement abroad of an arbitral award made in the United States between

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[94] Judgment of May 10, 1984, Bundesgerichtshof in Strafsachen, W. Ger. (1984), *summarized in* 10 Y.B. COM. ARB. 427 (1985).

[95] New York Convention, *supra* note 1, art. II(2).

[96] New York Convention, *supra* note 1, art. VII(I) (quoted in *supra* text accompanying note 85).

[97] *See* ZPO art. 1044 (W. Ger.).

[98] P. SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT (No. 73, 1975).

two foreign parties, which is based on an arbitration agreement complying with U.S. federal or state law but not complying with the Convention.

In the United States, the award made between two foreign parties falls, according to the *Bergesen* doctrine, under Chapter Two of the Federal Arbitration Act and the Convention. As the arbitration agreement does not comply with the Convention's requirements, enforcement cannot take place pursuant to the Convention. However, enforcement may, by virtue of the Convention's more-favourable-right-provision, be based on Chapter One of the Federal Arbitration Act or state arbitration law.

In a foreign country, enforcement of the award made between two non-U.S. parties in the United States falls also under the Convention. However, as the arbitration agreement does not comply with the Convention's requirements, enforcement can again not take place pursuant to the Convention. If the country in question has a domestic law under which foreign awards can be enforced (thus, independently of the Convention), the enforcement can, by virtue of the Convention's more-favourable-right-provision, be based on that domestic law. If that domestic law refers for the validity of the arbitration agreement to the law applicable to the arbitration (usually the arbitration law of the place of rendition of the arbitral award, in the *Bergesen* case, the United States), the validity of the arbitration agreement is, according to the *Bergesen* doctrine, governed by Chapter Two of the Federal Arbitration Act and the Convention. In other words, the invocation of the Convention's more-favourable-right-provision before the foreign court in this case does not help anything because the *Bergesen* doctrine would again lead to the Convention's applicability.

A solution for this complicated situation may be to invoke the more-favourable-right-provision of the Convention "in second degree." First, the more-favourable-right-provision is invoked before the foreign court for reliance on the domestic law of that court concerning the enforcement of foreign arbitral awards. That domestic law points to U.S. law which in turn, according to the *Bergesen* doctrine, points to the Convention. The more-favourable-right-provision of the Convention then could be invoked for the second time for reliance on Chapter One of the Federal Arbitration Act or state arbitration law which may contain requirements for the validity of the arbitration agreement which are less stringent than the Convention.

It is submitted that such complicated and confusing schemes should be avoided. The expansive interpretation by the court of appeals in *Bergesen* appears to have been developed with the purpose of being able to rely on the three-year limitation period of Chapter Two of the Federal Arbitration Act for the enforcement of arbitral awards rather than the one-year limitation period of Chapter One of that Act.

The irony of the *Bergesen* case is that legally the enforcement by the U.S. courts was unnecessary for enforcement of the award in Switzerland.[99] In fact, the Swiss Supreme Court confirmed by a judgment dated February 26, 1982, that no enforcement of the award by the courts in New York was needed for enforcement of the *Bergesen* award under the Convention in Switzerland. It is surprising that the Swiss judgment was not mentioned in the decision of the

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[99] *See supra* notes 7-12 and accompanying text.

district court (dated October 7, 1982) and that of the court of appeals (dated June 17, 1983).

VIII. Stateless Awards

A. Muller's Argument

Muller also argued before the court of appeals that the second criterion of nondomestic awards covers awards which Muller called "stateless awards," and that the award in question failed to qualify as such. Muller defined the stateless award as one "rendered in the territory where enforcement is sought but considered unenforceable because of some foreign component."[100] The court of appeals found this argument unpersuasive: "[S]ince some countries favouring the provision [i.e., the second criterion] desired it so as to preclude the enforcement of certain awards rendered abroad, not to enhance enforcement of awards rendered domestically."[101]

This reasoning of the court is not entirely clear. Either the court understood Muller's argument incorrectly or Muller presented his argument badly. Muller presumably referred to a third category of awards. It can be questioned whether this category falls under the Convention and, especially, under the second criterion of nondomestic awards.

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[100] Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983).

[101] *Id.*

B. Concept of Stateless Awards

Until now two types of awards have been discussed here, (1) an arbitral award governed by the arbitration law of the place of arbitration (most cases), and (2) an arbitral award governed, on the basis of an agreement between the parties, by the arbitration law of a country other than the place of arbitration (rather theoretical, corresponding to the second criterion). Some authors identify a third category, which Muller apparently had in mind: an arbitral award not governed by any arbitration law at all, but solely by an agreement of the parties.[102] Various names are invented for this category of awards: a-national, supra-national, trans-national, expatriate, denationalized or floating awards. The attractiveness of an arbitration and award detached from the ambit of any national arbitration law, is that domestically influenced particularities of a national arbitration law are in principle eliminated. The parties are free to organize the arbitration themselves or to authorize the arbitrators to do so, as they deem fit. The arbitration can take place anywhere, as the place of arbitration would not entail the applicability of the arbitration law of the country concerned.

However, the legal status of denationalized arbitration is uncertain. If the arbitration agreement does not provide, in sufficient detail, the constitution of the arbitral tribunal and the arbitral procedure, difficulties will arise as no recourse

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[102] See generally P. FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (1961); VAN DEN BERG, *supra* note 12, at 28-43; Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983); and Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981).

can be had to a national arbitration law. Furthermore, arbitration, international as it may be, needs at least a supporting judicial authority *(autoritre d'appui)*, which failing an international authority competent in this respect, is necessarily the court of some country. The judicial support may, for example, be needed for the challenge of an arbitrator. Supervision by a judicial authority over at least the validity of the arbitration agreement and the fundamental rules of due process must also be ensured. Such supervision is carried out in the action for setting aside the award, or a similar action. It is a generally accepted principle that the courts of the country under the arbitration law of which the arbitration takes or took place are the competent judicial authority in relation to the foregoing matter. Such competence would be excluded in the case of denationalized arbitration.[103] There are few international arbitrations where parties have agreed to a denationalized arbitration. There exist appalling examples of the difficulties encountered in enforcing arbitral awards resulting from denationalized arbitration.[104]

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[103] Paulsson, *Delocalization of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53, 59 (1983), wonders whether a setting aside in the country of origin should have an effect *erga omnes*. This effect is given in article V(1)(e) of the New York Convention, according to which enforcement of an award may be refused if it is set aside in the country of origin. It is, in my opinion, undesirable to exclude this ground for refusal of enforcement. *See* VAN DEN BERG, *supra* note 12, at 355-57.

[104] *See, e.g.*, SEEE v. Yugoslavia, (1956), *reprinted in* JOURNAL DU DROIT INTERNATIONAL 1075 (1959) (English and French versions of the arbitration award). An overview of the various proceedings is given in VAN DEN BERG, *supra* note 12, 41-43. Thirty (!) years after the date of rendition, the parties are still

It should be noted at this point that for a long time it was thought that arbitration under the Rules of the International Chamber of Commerce ("ICC") was denationalized. This belief induced the Court of Appeal of Paris to decide, in 1980, that an ICC award made in Paris between a Swedish shipyard and a Libyan state-owned corporation was not governed by French arbitration law.[105] The court, therefore, dismissed the action for setting aside the award. Subsequent to this decision, two developments occurred. First, in 1981, France adopted a new arbitration law specifically applicable to international arbitrations.[106] According to this law, awards rendered in an international arbitration in France can be subject to an action for setting aside before the French courts. Second, the ICC issued a new commentary on its Rules, in which it is expressly stated that "the mandatory rules of national law applicable to international arbitrations in the country where the arbitration takes place must anyway be observed, even if other rules of procedure are chosen by the parties or by the arbitrator."[107]

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litigating on the validity of the award. The latest score was in favour of SEEE: The French Cour d'appel of Rouen declared the award enforceable on November 13, 1984 (not yet published; case No. 982/82).

[105] Judgment of Feb. 21, 1980, Cour d'appel, Paris, *reprinted in* 6 Y.B. COM. ARB. 221 (1981).

[106] Decree No. 81-500, dated May 12, 1981, 1981 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE, 1398-1406 (codified at CODE DE PROCÉDURE CIVILE arts. 1492-1507), *reprinted in* 7 Y.B. COM. ARB. 271 (1983) (English translation).

[107] GUIDE TO ICC ARBITRATION, PUB. NO. 382, 39 (1983).

A denationalized arbitration must be distinguished from an arbitration which is internationalized within the limits imposed by a national arbitration law. Such internationalization can be achieved referring to arbitration rules geared to international arbitration, such as the ICC Rules or the UNCITRAL Arbitration Rules.[108] The limits imposed by a national arbitration law are those provisions which are mandatory. It is, therefore, important in international arbitrations to designate a place of arbitration in a country which has a liberal arbitration law.

C. New York Convention Not Applicable to Stateless Awards

After the foregoing explanation as to what constitutes a stateless award, it is appropriate to return to the argument made by Muller before the court of appeals. The court of appeals rightly rejected Muller's argument that the second criterion covers stateless awards, although the court's reasoning is somewhat confusing. The New York Convention must be deemed to apply to arbitral awards which are governed by a national arbitration law only. This principle applies to both the first and second criteria of the Convention's field of application. It is true that the text of the Convention, as far as its field of application is concerned, does not require that the award be governed by a national arbitration law. However, if the Convention's scope is read in conjunction with the Convention's other provisions, it becomes evident that this requirement is implied. Enforcement

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[108] UNCITRAL, Report of Ninth Session, [1976] 7 Y.B. Comm'n Int'l Trade L. 22, Doc. A/CN.9/SER.A/1976, *reprinted in* 2 Y.B. COM. ARB. 161 (Int'l Council for Com. Arb. 1977). *See* Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COM. ARB. 172 (1977).

of an award may be rejected if the respondent can prove that the arbitration agreement is invalid "under the *law* to which the parties have subjected it, or failing any indication thereon, under the *law* of the country where the award was made.[109] Enforcement of an award may also be refused if the respondent can prove that the award has been set aside by a court of "the country in which, or under the *law* of which, that award was made.[110] Although another basis for refusal of enforcement, which concerns irregularities in the composition of the arbitral tribunal and the arbitral procedure, refers in the first place to the agreement of the parties on these matters, and failing such agreement, to the law of the place of arbitration,[111] this provision cannot be deemed to alter the principle that the Convention can apply to arbitral awards which are governed by an arbitration law only.[112]

The New York Convention not being a basis for enforcement of stateless awards, the only realistic approach to giving this category of awards a sufficient legal backing is an appropriate international convention. Such a treaty exists for investment disputes: The Convention on the Settlement of Investment Disputes Between States and Nationals of Other

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[109] New York Convention, *supra* note 1, art. V(1)(a) (emphasis added).

[110] New York Convention, *supra* note 1, art. V(1)(e) (emphasis added).

[111] New York Convention, *supra* note 1, art. V(1)(d) (set forth in full in supra note 46)

[112] *Accord* Sanders, *Consolidated Commentary Volumes V and VI*, 6 Y.B. COM. ARB. 202, 205 (1981).

States,[113] (Washington Convention) made in Washington, March 18, 1965. This Convention provides for a self-sufficient system of truly international arbitration which is solely governed by the provisions of the Convention and the rules and regulations issued thereunder. There is no other international convention comparable to the Washington Convention. Specifically, the New York Convention regulates two aspects of international arbitration only: the enforcement of the arbitration agreement and that of the arbitral award. All other aspects are by necessity governed by some national arbitration law, which, as explained before, is normally the arbitration law of the place of arbitration.

IX. Conclusion

The New York Convention applies in the first place to arbitral awards which are made in the territory of another Contracting State. Along with the territorial criterion, the Convention provides that it also applies to the enforcement of arbitral awards which are not considered domestic awards. According to a so-called conventional interpretation which is based on the legislative history and text of the Convention, nondomestic awards are awards which are made in the enforcing State but which are, by agreement of the parties, governed by the arbitration law of another State. The second criterion was added at the instigation of certain civil law countries when the Convention was drafted in 1958. It is virtually never used in practice, as parties choose the law applicable to their arbitration by designating the place of arbitration. Exercising the capacity to choose an arbitration

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[113] Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 160.

law which is different from that of the place of arbitration can lead to inextricable legal complications. Consequently, the first criterion of the Convention's scope seems to be the only relevant one for practice. In addition, neither the first nor the second criterion can be deemed to apply to stateless awards, which are awards not based on any arbitration law.

The court of appeals in *Bergesen v. Muller* expanded the conventional interpretation of nondomestic awards to any arbitral award between two foreign entities made in the United States, regardless of whether it is governed by federal or state arbitration law. This means that enforcement of such an arbitral award is governed by the New York Convention rather than Chapter One of the Federal Arbitration Act or state law. The expansive interpretation seemingly favours international arbitration in the United States. It may cater to those cases where two foreigners arbitrating in the United States cannot obtain jurisdiction in the U.S. courts under Chapter One of the Federal Arbitration Act. This interpretation, however, poses a number of problems. The Convention imposes requirements for the written form of the arbitration agreement which are more demanding than the U.S. federal law and most of the state laws. Furthermore, it may give losing parties an extra possibility to stave off the day of reckoning. Under U.S. federal law and most of the state laws enforcement of an arbitral award is relatively simple. In contrast, under the Convention, enforcement of an award can be resisted on a number of grounds. In addition, the expansive interpretation may cause problems for enforcement abroad of arbitral awards with a foreign element made in the United States. The legal framework of international commercial arbitration is fairly complicated. The expansive interpretation has regretfully not contributed to its simplification.

Journal of American Arbitration
2004

Article

*1 OVER-PREEMPTION OF STATE VACATUR LAW: STATE COURTS AND THE FAA

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*2 I. INTRODUCTION

Several recent decisions in state courts vacating multi-million dollar arbitration awards have garnered significant attention from the media due to the size of the award vacated. [FN1] A subsidiary issue, however, has escaped attention: the courts' inconsistent use of the preemption doctrine [FN2] under the Federal Arbitration Act (FAA) [FN3] to preempt state statutory grounds governing motions to vacate. The FAA preemption doctrine provides that the federal substantive law of arbitrability [FN4] preempts conflicting state laws in federal and state court. [FN5] For example, in Sawtelle v.

Waddell & Reed, Inc., [FN6] a panel in New York's Appellate Division, First Department vacated a $25 million punitive damages *3 award arising out of an employment dispute in the securities industry, on the ground that the arbitrators "completely ignored applicable law" in awarding punitive damages to the claimant. [FN7] Without discussion--other than an acknowledgement that the FAA governs employment disputes in the securities industry--the court summarily decided the threshold issue that the standard of review of the award was found in section 10 of the FAA and the federal judicially created "manifest disregard of the law" test and not New York's arbitration statute. [FN8]

In contrast, two other panels of the same court applied New York statutory grounds to motions to vacate securities arbitration awards. In Sands Bros. & Co. v. Generex Pharmaceuticals, Inc., [FN9] the First Department, also without discussion, affirmed the lower court's vacatur of a $28 million arbitral award on state law grounds, stating that the panel failed to comply with an earlier directive of the court [FN10] and that the *4 award was "totally irrational," a ground for reversal in New York's [Civil Practice Law and Rules] CPLR section 7511. [FN11]

Similarly, in In re Arbitration Between UBS Warburg L.L.C. and Auerbach, Pollak & Richardson, Inc., [FN12] the First Department affirmed the trial court's vacatur on state law grounds of a $5.7 million arbitration award in a securities dispute between brokerage firms over a fraudulent securities transaction. The lower court had noted tersely that the parties' arbitration agreement included a generic New York choice of law clause and that was why CPLR section 7511 governed the motion to vacate. [FN13] The Appellate Court did not discuss the standard of review of the award, but wrote merely that the

Supreme Court had "properly determined" that the panel had "manifestly disregarded the applicable law." [FN14]

These conflicting decisions highlight the difficulties that state courts have encountered applying the Supreme Court's current FAA preemption jurisprudence. These difficulties focus primarily on whether the FAA preempts in state court only substantive state rules, such as those regulating parties' arbitration agreements, or also state arbitration law, such as procedures governing the arbitration process. [FN15] As a result, one immediate challenge for scholars, litigants, and judges will be to reconcile the various Supreme Court preemption cases to come up with a cohesive doctrine for state courts to apply to arbitration decisions. [FN16]

One area where the struggle is in its infancy is in the vacatur context: where a losing party to an arbitration award moves to overturn the award in court. Section 10 of the FAA sets forth explicit grounds on *5 which a court can vacate [FN17] an arbitration award. [FN18] Additionally, forty-nine of fifty states have statutory provisions designating the grounds for vacatur, some of which are identical to the FAA grounds. [FN19] Moreover, all federal courts, and state courts to a more limited degree, have crafted additional nonstatutory common law grounds for vacatur, including the oft-cited "manifest disregard of the law" standard. [FN20] Because parties might file a motion to vacate in state or federal court, depending on jurisdiction, [FN21] for each vacatur motion, courts must decide the threshold *6 issue of whether section 10 of the FAA or the state law statute provides the standard of review. [FN22]

Some scholars suggest that section 10 might preempt state vacatur law if it differed from the FAA, but decline to engage in a detailed analysis of the issue. [FN23] Yet, while most

state statutes are identical or substantially similar to section 10 of the FAA, [FN24] to the extent the grounds are different, state courts have a strong interest in application of their own states' law. [FN25] Most significantly, if a state court chooses to apply the "manifest disregard of the law" standard for vacatur accepted by every federal circuit (although with varying degrees of strictness) under the *7 reasoning that it is part of the FAA, [FN26] when that state has rejected such a ground under state law, then the court will have trumped its own state's policy to restrict judicial review of the merits of an arbitral award. This is precisely the situation in Missouri, where a state court applied the manifest disregard standard under federal law (without citing a United States Court of Appeals for the Eighth Circuit case), [FN27] even though Missouri courts have rejected it as a state law ground for vacatur. [FN28] Likewise, in New York, the state version of manifest disregard allows vacatur only for disregard of the law in violation of public policy, [FN29] whereas the United States Court of Appeals for the Second Circuit's manifest disregard standard as used by the Sawtelle court is slightly broader. [FN30]

Conversely, if a state court has adopted a broader test of manifest disregard than the federal court in that circuit, then the application of the *8 federal manifest disregard standard would defeat the state's decision to accord broader review to awards. [FN31] This is the scenario in Illinois, where the state courts permit review for manifest disregard when the arbitrators "deliberately disregarded what they knew to be the law," [FN32] whereas the United States Court of Appeals for the Seventh Circuit permits review only when the award directs the parties to violate the law. [FN33] Thus, an Illinois state court's improper application of the federal standard of review on preemption grounds can have serious consequences for the parties.

This Article will examine the state courts' approach to FAA preemption on a vacatur motion since the most recent Supreme Court FAA preemption decisions. [FN34] This Article will demonstrate that, with little or no analysis, state courts over-apply the FAA to commercial arbitration awards, [FN35] particularly the "manifest disregard" prong, causing what I call "over-preemption" and frustrating their own state's interests in the application of its arbitration law. Part II of this Article will briefly review Supreme Court FAA preemption jurisprudence. Part III of this Article will use illustrative state court decisions to demonstrate that the state courts are applying FAA preemption in the vacatur context in an inconsistent manner and thus over-preempt the FAA. Part IV of this Article will show that, even after balancing the competing policy concerns of federalism and judicial uniformity, this "over-preemption" is not required under the Supreme Court's jurisprudence and that only in very limited circumstances must a state court apply the grounds for vacatur set forth in section 10 of the FAA. Part IV will also demonstrate that state courts need not apply the "manifest disregard" prong as part of the FAA, even if the FAA were held to apply. Part V will conclude by *9 setting forth a framework for state courts to use when considering what law applies to a motion to vacate that takes into account Supreme Court precedent and policy considerations.

II. OVERVIEW OF SUPREME COURT'S FAA PREEMPTION DOCTRINE [FN36]

The Supreme Court has consistently announced that the FAA, enacted in 1925 "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate," [FN37] reflects a strong federal policy favoring arbitration. [FN38] In light of that policy, the Court views the FAA as "creat[ing] a body of federal substantive law of arbitrability, applicable to

any arbitration agreement within the coverage of the Act." [FN39] The Court has further explained arbitrability in this context to mean "the duty to honor an agreement to arbitrate." [FN40]

By its terms, the FAA governs agreements to arbitrate involving "transactions in commerce." [FN41] The Court has interpreted this phrase very broadly to include any transaction that in fact involves interstate commerce, even if the parties did not anticipate an interstate impact. [FN42] Thus, the FAA applies to virtually every judicial decision arising out of an arbitration agreement. [FN43]

*10 A. Conflict Preemption

It is also clear, however, that the "FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." [FN44] In other words, state arbitration laws have some role in judicial decision-making arising out of an arbitration. As a result, the Supreme Court has established the doctrine of FAA preemption: the FAA preempts a state law that "actually conflicts with federal law--that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."' [FN45] And, the Court has analyzed the history of the FAA and concluded that its primary purpose was to "require[] courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." [FN46] "Conflict preemption" [FN47] also means that if a state law is consistent with the policies and purposes of the FAA, that is, it does not undermine the enforceability of the arbitration agreement, then the FAA does not displace applicable state law. [FN48] Thus, in the *11 absence of a conflict between state law and the FAA, courts need not reach the preemption issue.

In Southland Corp. v. Keating, [FN49] the Court expressly held that the FAA preemption doctrine applies in state court as well as federal court. In Southland, the California Supreme Court had held that a provision of the California Franchise Investment Law that required judicial, not arbitral, resolution of claims brought under the statute was not preempted by the FAA. [FN50] The Supreme Court reversed, holding that the state provision contradicted FAA section 2, which declares arbitration agreements irrevocable and enforces the parties' agreements according to their terms. [FN51] Thus, Southland represents the Supreme Court's first explicit application of FAA preemption to a decision from a state court [FN52] and the first occasion where the Court explicitly prevented a state court from applying its own state law because it conflicted with the FAA. [FN53]

Agreeing with Justice O'Connor's strong dissent in Southland, [FN54] some scholars have assailed the majority opinion as based on an inaccurate interpretation of Congress's intent in enacting the FAA. [FN55] Similarly, Justice Thomas's dissent in Allied-Bruce Terminix Cos. v. Dobson [FN56] strenuously argued that the FAA does not apply in state court and that Southland was wrongly decided and should be overruled. [FN57] While this "barrage of criticism" [FN58] initially cast some doubt on the continued vitality and expansion of the preemption doctrine, other *12 scholars have defended the Southland decision. [FN59] In 1995, the Court expressly rejected parties' arguments urging the Court to overturn its Southland decision. [FN60] More recent Supreme Court arbitration decisions do not even acknowledge litigants' attacks on Southland. [FN61] Thus, FAA preemption appears here to stay.

Since Southland, the Court has ruled on four occasions that the FAA preempts a state law. [FN62] Professors Stephen L. Hayford and Alan R. Palmiter astutely recognize that none

of these decisions actually preempting state law involve state arbitration law—laws that almost uniformly further a pro-arbitration policy. [FN63] Rather, the Court has preempted state laws on non-arbitration matters that contain "lingering anti-arbitration sentiment." [FN64] For example, in Perry, [FN65] the Court preempted a provision of the California Labor Law which provided that wage collection actions could be pursued in state court, regardless of the existence of an arbitration agreement. [FN66] Similary, in Casarotto, the *13 Court held that the FAA preempted a Montana statute requiring that, to be enforceable, an arbitration agreement must provide a very specific notice (typed in underlined capital letters on the first page) that it is subject to arbitration. [FN67] Because this notice requirement applied only to arbitration agreements and not contracts generally, the law singled out arbitration agreements for hostile treatment and was displaced by the FAA. [FN68]

B. Choice of Law Clause Exception

The other two decisions since Southland preempting state laws explore the scope of FAA preemption and carve out another exception to the FAA preemption doctrine. Faced with a challenge to a state court's ruling that a state procedural rule did not have to yield to a conflicting provision in the FAA, the Court established that the parties can avoid the application of the FAA through a choice-of-law clause included in their pre-dispute arbitration agreement in Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University. [FN69]

In Volt, the parties had entered into a construction contract. The contract required the parties to arbitrate any disputes arising out of it and contained a choice-of-law clause providing that "'[t]he Contract shall be governed by the law

of the place where the Project is located"'--i.e., California law. [FN70] Under the contract in Volt, after one party to the contract filed for arbitration, the other party invoked in a California state court a provision under the California Arbitration Act that allowed a party to make a motion to stay an arbitration proceeding pending resolution of a related litigation proceeding between a party to the arbitration agreement and third parties not bound by it. [FN71] The California court's ruling on the stay motion, while recognizing the general applicability of the FAA to the contract because it involved interstate commerce, interpreted the parties' arbitration agreement to incorporate the California rules of arbitration and held them not preempted by the FAA. [FN72]

*14 The Court agreed, holding that section 4 of the FAA--authorizing a party to an arbitration agreement to "petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement" [FN73]--did not pre-empt the California statute. The Court reasoned that "application of [the California statute] to stay arbitration under [the construction contract] would [not] undermine the goals and policies of the FAA." [FN74] The Court noted that the FAA does not prevent "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself" and thus parties to arbitration agreements can "specify by contract the rules under which that arbitration will be conducted." [FN75] Accordingly, "[w]here ... parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." [FN76]

The Court's 1995 decision in Mastrobuono v. Shearson Lehman Hutton, Inc. [FN77] applied the FAA preemption doctrine to a securities arbitration claim by a brokerage firm

customer where the customer agreement contained a New York choice-of-law clause. In that case, customers brought an arbitration proceeding against a brokerage firm for mishandling their account. After a hearing, the panel awarded the customers compensatory and punitive damages. The firm moved to vacate the award of punitive damages in the United States District Court for the Northern District of Illinois, arguing that the parties' generic New York choice of law clause incorporated New York's Garrity rule that prohibited arbitrators from awarding punitive damages. [FN78] The district court granted the motion and the Seventh Circuit affirmed. [FN79]

The Court reversed, ruling that the FAA preempted the Garrity rule. The Court found that the parties' choice-of-law clause was ambiguous and did not expressly incorporate the New York rule precluding the award of punitive damages in arbitration. When a clause is ambiguous, the Court reasoned, "'due regard must be given to the federal policy *15 favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" [FN80]

To distinguish this case from Volt, the Court highlighted the difference in the procedural posture of the case: the Court was reviewing the Seventh Circuit's (i.e., a federal court's) interpretation of the parties' contract, rather than a state court's interpretation of a contract under its state contract rules, as in Volt--an interpretation to which the Court gave deference. [FN81] Mastrobuono thus illustrates the difference in outcome on an issue of FAA preemption for a case that reached the Supreme Court from a federal circuit court rather than from a state's highest court. This distinction is significant for state courts as it permits them to interpret under their own state's rules of contract interpretation--without regard for the

FAA--whether the parties' choice of law clause included the standards of judicial review of an award or not.

C. Preemption of State Procedural Rules.

Volt and Mastrobuono express the Supreme Court's current approach to FAA preemption. These decisions, seemingly in conflict, have fueled further the state courts' difficulties in interpreting the FAA preemption doctrine. [FN82] Commentators also have difficulty reconciling the two cases, as their results seem contradictory. [FN83] One scholar has critiqued the Mastrobuono Court's distinction of Volt as encouraging forum-shopping--as it suggests that the Mastrobuono approach applies only when a federal court is interpreting a choice-of-law clause. [FN84]

An alternative, more plausible distinction is that Volt involved the preemption of a state procedural rule under the California arbitration statute whereas Mastrobuono involved preemption of a substantive principle of New York law--the rule that arbitrators cannot award punitive damages. [FN85] And the precise procedural rule at issue in Volt was one favoring the use of arbitration as a dispute resolution process *16 whereas Mastrobuono involved a state law "reflect[ing] the 'ancient judicial hostility to arbitration."' [FN86] Language in subsequent Supreme Court opinions supports this distinction. [FN87]

As a result, while there is widespread consensus that the FAA preempts substantive state laws that conflict with the substantive provisions of the FAA, [FN88] there is far less agreement on the scope of FAA preemption of state procedural rules and the corollary issue of whether the procedural provisions of the FAA apply in state court. [FN89]

Equally unsettled is what rules can be classified as procedural rather than substantive. [FN90]

In federal court, the issue arises only if the parties' arbitration agreement includes a choice-of-law clause designating a state's law. If the clause specifically prescribes that a state's arbitration law applies, then the court should honor the unambiguous intent of the parties. In contrast, if the clause simply requires that a state's law governs disputes arising out of the underlying contract, or other similarly generic language, then it is more problematic for the court to ascertain the *17 parties' intent when they included that boilerplate clause. [FN91]

One could argue that the parties' generic choice-of-law clause includes a choice for the state's arbitration law as well as its substantive law. Federal courts, however, generally do not interpret a choice-of-law clause to include a state procedural rule, including a procedural rule governing the arbitration process. [FN92] Indeed, most federal courts addressing this issue have concluded that a generic state choice-of-law clause does not incorporate a choice for that state's vacatur grounds. [FN93]

Before Mastrobuono or even Volt, numerous state courts had interpreted Southland to mean that state procedural rules were not preempted. [FN94] Applying Volt, one court held specifically that the FAA *18 does not preempt state vacatur law, because "[t]he state statute does not obstruct the congressional purposes and objectives." [FN95] Since Volt and Mastrobuono, many state courts have continued to hold that the FAA does not preempt state procedural rules, as long as those rules do not defeat the substantive right to arbitration granted by the FAA. [FN96] These courts have thus applied state arbitration rules regarding procedural matters to

arbitrations governed by the FAA, even where the FAA has a provision addressing that procedure--including FAA sections 4 (right to a jury trial on motion to compel), [FN97] 12 (service of process of notice of *19 motion to vacate) [FN98] and 16 (appeals). [FN99] Other courts hold that the FAA's procedural provisions preempt state procedural rules. [FN100] These decisions are difficult to reconcile across state lines.

III. STATE COURTS' INCONSISTENT USE OF FAA PREEMPTION OF VACATUR MOTIONS

As discussed above, since Volt and Mastrobuono, state courts have been grappling with the scope of FAA preemption of state procedural rules and have applied the doctrine in a confusing and inconsistent manner. This section of the Article explores examples of this confusion and inconsistency in several illustrative states--New York, Florida, Georgia, Illinois, Texas and California [FN101]--in one procedural context only: vacatur motions and the grounds applicable to such a motion. [FN102] *20 Some state courts have declared that the FAA preempts all state vacatur laws wholesale; [FN103] others have narrowly limited the contexts in which it will find that the FAA preempts its own state laws. [FN104] Still other state courts frame their analysis around whether the parties' arbitration agreement includes a choice-of-law clause. [FN105]

A. New York

Perhaps the clearest example of intrastate judicial inconsistency is in New York. In Hackett v. Milbank, Tweed, Hadley & McCloy, [FN106] the Court of Appeals addressed FAA preemption in the context of the parties' New York choice of law clause. In that case, a former partner in a law firm, invoking an arbitration clause in a partnership agreement, brought an arbitration proceeding against his former firm seeking payments allegedly owed to him following his departure from the partnership. After losing the arbitration, the partner moved to vacate the award, challenging the arbitrator's power. [FN107] The New York Supreme Court vacated the award on public policy grounds and the Appellate Division affirmed. [FN108]

On appeal, the law firm contended that the FAA provided the grounds for vacatur. The Court of Appeals disagreed, and ruled that the state law grounds for vacatur under N.Y. CPLR section 7511 governed *21 the dispute. [FN109] First, the court recognized that, while the FAA generally governed the partnership agreement, the parties' New York choice of law clause in the agreement displaced the FAA. [FN110] Second, the court noted that the choice of law clause explicitly provided that the only grounds for vacating an award were those specified in CPLR sections 7509 and 7511. [FN111] Thus, the Court of Appeals honored and gave effect to the parties' "explicit and unambiguous choice of law" under Volt. [FN112] Hackett left unsettled the issue of what law would govern in New York where the arbitration agreement contained a generic choice of law clause.

Following Hackett, the lower courts in New York have inconsistently used the FAA preemption doctrine to preempt state statutory grounds governing motions to vacate. Thus,

lower courts in New York apply the FAA grounds (1) where the parties' arbitration agreement does not contain a choice of law clause; [FN113] (2) without discussion of a choice of law clause; [FN114] and (3) even where the parties chose a state law to govern. [FN115]

*22 Conversely, several recent vacatur decisions by lower courts in New York have--without a discussion of a choice of law clause--applied the CPLR grounds for vacatur to arbitration agreements governed by the FAA either (1) based on the parties' New York generic choice of law clause; [FN116] or (2) without discussion of the preemption doctrine or a choice-of-law clause. [FN117] There appears to be little explanation for the discrepancy.

*23 B. Texas

The Texas courts are also inconsistent in their application of FAA preemption to vacatur motions. The Supreme Court of Texas recently dodged the issue by invoking both the applicable FAA and Texas grounds of vacatur, [FN118] which were identical, in an FAA-governed arbitration. [FN119] The intermediate appellate courts apply the FAA grounds on the broad assumption that the FAA preempts all state arbitration law [FN120] or because the parties' generic choice of law clause was not explicit enough to include Texas vacatur law. [FN121] Thus, these courts have over-preempted Texas vacatur law. Other courts apply the Texas Arbitration Act due to the parties' explicit choice of law clause along with a finding that Texas law does not conflict with the FAA, [FN122] or due to a finding that vacatur motions are procedural and thus are always governed by state law. [FN123]

C. Florida

Generally, without discussion of FAA preemption, Florida courts apply state law grounds [FN124] to a motion to vacate an arbitration award governed by the FAA. [FN125] One court applied FAA vacatur grounds, *24 however, noting only that "[t]he parties agree that federal law, not state law, governs evaluation of the substantive aspects of [movant's] claims." [FN126]

D. Georgia

In apparent precise opposition to Florida courts, when Georgia courts acknowledge the application of the FAA, they conclude, without discussion of the scope of preemption, that the FAA grounds for vacatur, not the Georgia Arbitration Code, [FN127] apply to motions to vacate. [FN128] Thus, Georgia applies complete preemption, ignoring Georgia state law even if it does not conflict with the FAA. This represents another example of over-preemption.

E. Illinois

Illinois courts uniformly apply the Illinois Arbitration Act [FN129] to motions to vacate arbitration awards governed by the FAA. [FN130] These cases in large part do not analyze the intersection of Volt and Mastrobuono. Rather, they either cite to a conclusory decision of the *25 Supreme Court of Illinois that pre-dates Mastrobuono [FN131] or do not even discuss the issue. Thus, while the Illinois courts reflect no inconsistency in their automatic application of state law grounds for vacatur, they also reveal no in-depth analysis of the scope of FAA preemption and thus are vulnerable to a preemption argument. [FN132]

The one exception I have found to these general rules is the Illinois appellate court decision in Tim Huey Corp. v. Global Boiler & Mechanical, Inc. [FN133] In that case, the parties' arbitration agreement designated Texas law to govern disputes arising from their contract. The losing party moved to vacate the award in Illinois circuit court and cited grounds under the FAA, claiming the FAA preempted state law grounds. The Appellate Court disagreed, ruling that the FAA preempts only "conflicting State law." [FN134] The court also ruled that because the purpose of the FAA is to enforce the parties' arbitration agreements, and the parties designated Texas law, the Texas grounds for vacatur applied. [FN135] In acknowledging and ultimately rejecting the moving party's preemption claim, the Tim Huey court approaches the level of analysis required by the Supreme Court in Volt and Mastrobuono.

F. The Exception: California

In a comprehensive and well-reasoned opinion, a California appellate court has recognized the over-preemption and halted it in favor of California arbitration law. Thus, in Siegel v. Prudential Insurance Co. of America, [FN136] a former employee of a brokerage firm sued the firm and a supervisor for wrongful termination. After the panel awarded compensatory and punitive damages to the former employee, the *26 employee moved to confirm and the respondents cross-moved to vacate the award in superior court. The trial court confirmed the award and denied the cross-motion to vacate. [FN137] The respondents appealed on the grounds that, inter alia, the panel acted in manifest disregard of the law under the FAA. [FN138]

The California appellate court, following a thorough analysis, concluded that the FAA did not preempt California

arbitration law with respect to the standard of review of an arbitration award. In reaching this result, the court reasoned that:

1. "manifest disregard of the law" is not a recognized ground of vacatur in California; [FN139]

2. "manifest disregard of the law" is not part of the FAA, but is a judicially-created ground of review independent of the FAA; [FN140]

3. the language of section 10 on its face suggested it did not apply in state court; [FN141]

4. the FAA has only limited preemptive effect in state court when a state law undercuts the enforceability of an arbitration agreement; [FN142] and

5. the California statute that prevents the review of the merits of an arbitration award does not contradict the purposes and policies of the FAA. [FN143]

Thus, as opposed to section 10 of the FAA and the "manifest disregard of the law" standard, the court reviewed the arbitration award pursuant to the standards set forth in section 1286.2 of California's Code of Civil Procedure, which did not allow review for manifest disregard of *27 the law. [FN144] Accordingly, the court affirmed the trial court's denial of the motion to vacate. [FN145]

While one intermediate appellate court in California appears to have thoroughly analyzed the intersection of current Supreme Court FAA preemption jurisprudence with grounds for vacating an arbitration award, most other states have addressed this issue in an inconsistent manner, with

courts within the same state in conflict (e.g., New York; Texas) as well as courts in different states applying contradictory doctrines (e.g., California vs. Florida). This is significant where courts are vacating multi-million dollar awards and the choice of the applicable standard of review can affect the outcome.

IV. OVER-PREEMPTION OF VACATUR LAW FRUSTRATES STRONG PUBLIC POLICIES

The inconsistency among and within the states, which has resulted in over-preemption, raises several public policy concerns. The purpose of vacatur law is to enforce the parties' agreement to arbitrate by minimizing judicial intrusion into the dispute resolution process. Vacatur law attempts to balance the competing considerations of the arbitration parties' desire for finality, low cost, efficiency, and speed with the need for some limited review of the process to ensure fairness and to provide some minimal due process safeguards. [FN146] Because "[t]he standard of judicial review of arbitral awards defines the line between public justice and private justice," [FN147] preemption in the vacatur context has implications for this public/private balance so finely drawn.

Over-preemption defeats the objective of uniformity of state arbitration laws, sought by the drafters of the Uniform Arbitration Act *28 and Revised Uniform Arbitration Act. [FN148] To the extent that courts within one state are inconsistently applying the preemption doctrine to vacatur motions, litigants within that state have lost the predictability and rule of law that governs citizen conduct. Interestingly, the lack of predictability alleviates the risk of forum-shopping that could arise from the lack of judicial uniformity. Because parties cannot predict what the result will be even in courts within the same state, even at the same judicial level, then

they will not shop for a different forum depending on their predicted results.

Additionally, and ironically, over-preemption of state vacatur law--in the name of avoiding conflict with the FAA--undermines the public policy reflected in the FAA to enforce the parties' agreement to arbitrate on its precise terms and in line with the parties' expectations. Those expectations include arbitration's principle characteristic of finality and the understanding that courts do not review the merits of the awards. To the contrary, narrow grounds of judicial review reflect the strong belief that parties to arbitration agreements are not permitted a second shot at a favorable outcome, even if they are dissatisfied with the arbitrators' decision. [FN149] This is particularly problematic in a jurisdiction where the applicable federal circuit's standard of review is broader than the state's within that circuit. [FN150] If the parties, via their arbitration agreement, expect state arbitration law to apply to the arbitral process, any over-preemption would frustrate these expectations by applying a potentially broader standard of review than contemplated.

In addition to the need for judicial uniformity and the respect of the parties' arbitration agreement, another public policy frustrated by over-preemption is judicial support of federalism. Scholars have recently returned to basics, articulating the reasons why respecting federalism is important to our democratic society and institutions. [FN151] As described by Professor Barry Friedman, those "values of federalism" include increasing public participation in democracy, promoting accountability, *29 making states laboratories for experimentation, protecting citizens' health, safety, and welfare, enhancing cultural and local diversity, and diffusing power to protect liberty. [FN152] Professor Calvin Massey has identified the values as the preservation of

individual liberty, the desire to maximize the satisfaction of citizen preferences, experimentation and community, and the provision of political accountability by increasing citizen participation in democratic processes. [FN153] Significantly, Professor Massey stresses the judicial role in enforcing federalism, as opposed to the role of political institutions, arguing that "the Court's role is to make sure that the Constitution's elasticity of federalism is not lost by reckless and untoward stretching of the fabric." [FN154]

State judicial over-preemption would be an unwarranted "stretching of the fabric." While the FAA has expanded dramatically in coverage since its passage, there is no reason it should eliminate state arbitration law entirely. Why shouldn't a state court be responsible for striking the appropriate balance between judicial review and arbitration finality? To the extent state courts are applying the FAA in circumstances where they do not need to, those courts are upsetting the balance of power created by our federalist system, by granting more power to the FAA than intended by either Congress or permitted by the Constitution. [FN155] To the extent that state courts are applying state law where the FAA should apply, those courts have abrogated Congress's purpose and intent in enacting the FAA and have limited its reach improperly. For all of these reasons, a coherent doctrine should be applied in all states to reflect the compromise between Volt and Mastrobuono and to respect the federalism concerns of states.

V. A FRAMEWORK TO REDUCE OVER-PREEMPTION

A. Section 10 of the FAA Does Not Apply In State Court

As the Siegel court has concluded, I have concluded that, unless the parties' arbitration agreement specifically designates the section 10 *30 grounds as those governing a motion to vacate, or the state vacatur grounds are so broad as to convert vacatur from a procedural rule to a substantive re-allocation of authority to the courts, section 10 and the judicially-crafted "manifest disregard" standard do not apply in state courts. My conclusion emerges from the intersection of several principles.

First, this conclusion is consistent with principles of conflict preemption. The Supreme Court's preemption jurisprudence makes clear that the FAA preempts state law only "to the extent that it actually conflicts with federal law--that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [FN156] And, because "the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate [were] enforced according to their terms,"' [FN157] unless the parties designated applicable law, application of state law grounds for a vacatur motion does not conflict with the "body of federal substantive law of arbitrability" [FN158]--a body of law which does not dictate the standards of review of an arbitration award.

Moreover, if the state law grounds for vacatur are as limited or more so than the grounds specified in the FAA, then state law should apply, even without a choice of law clause, because the state law does not conflict with the federal grounds. [FN159] There are strong public policy reasons to

support a state court's application of its own state's arbitration rules. If a state's policy is expressed through a statute severely limiting the judiciary's role in upsetting the finality of an award, a court would further no FAA purpose by preempting such a law. States should be able to enforce their laws designed to ensure that arbitration is expeditious and final through strictly limited judicial review, without fear of FAA intrusion. [FN160]

*31 Finally, if the parties did designate a particular law to apply, then, unless a court construes that choice of law to preclude grounds for a vacatur motion, the court should honor that choice and apply the chosen law--whether it be state or federal. The FAA preemption doctrine could possibly preclude application of that state's vacatur law only if that law provides grounds broader than those allowed under the FAA. [FN161]

A second principle supporting my conclusion is that the precise language of section 10 strongly suggests it applies only in federal court. Thus, FAA section 10(a) provides that "the United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration." [FN162] The plain meaning of the statute suggests that section 10 is limited to application in federal district courts. [FN163] Also, general principles of statutory interpretation dictate that the plain meaning of a statute prevails even before the duty of interpretation arises. [FN164]

The Supreme Court, in dicta, has supported this analysis. For example, in Volt, the Court suggests that FAA sections containing language appearing to limit them to federal court mean they are limited to federal court:

While we have held that the FAA's "substantive" provisions--§ § 1 and 2--are applicable in state and federal court, we have never held that § § 3 and 4, which by their terms appear to apply only to proceedings in federal court, see K"http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS3&FindType=L"9 U.S.C. § 3 (referring to proceedings "brought in any of the courts of the United States"); § 4 (referring to "any United States district court"), are nonetheless applicable in state court .... [FN165]

Thus, the Supreme Court considers the language of the statute referring to federal court to be indicative of congressional intent not to have procedural sections of the FAA apply in state court.

*32 A third principle supporting my conclusion is the fact that vacatur law is more aptly characterized as procedural, not substantive, in nature. [FN166] The federal law actually preempting conflicting state law is the substantive principle that parties' arbitration agreements should be enforced on equal footing as ordinary contracts. Vacatur law prescribes the very narrow grounds [FN167] on which a court will second-guess the arbitrators' decision. Vacatur does not challenge the determination that the parties had an enforceable arbitration agreement. Because vacatur is a courtroom procedure providing for limited judicial review of the arbitration process, preemption of rules limiting the enforcement and interpretation of a contract is inapposite. [FN168]

Some courts have characterized the vacatur rules as substantive, not procedural. [FN169] These courts reason that, because judicial review of an arbitration award provides

the courts with some oversight authority over the arbitrators, the standards of review affect the allocation of power between arbitrators and courts. This allocation of power goes to the heart of the effectiveness of arbitration as a dispute resolution process and, therefore, affects substantive rights of the disputants. [FN170]

I would argue that the characterization of vacatur as substantive rather than procedural should be limited only to the situation where a state authorized a broad de novo review of an award. In this *33 circumstance, the parties' choice of the finality of arbitration as a means of dispute resolution would be threatened. [FN171] Courts could permit lengthy appeals in which the courts second-guessed the merits of the decision of the arbitrators. This would constitute a re-allocation--from the arbitrators to the courts--of the authority to decide parties' disputes with finality and then would substantively alter the nature of arbitration as contemplated by the FAA.

While, of course, a statute authorizing such broad judicial review would be anti-arbitration and inconsistent with the spirit of the FAA, in reality, no state currently authorizes such broad review. Moreover, most states' public policies support extremely limited review of the merits of awards to reinforce the expeditious and inexpensive nature of arbitration. [FN172] Any vestigial state anti-arbitration sentiment is expressed through laws singling out arbitration agreements for hostile treatment rather than laws designed to increase state court dockets once parties submit to arbitration. Therefore, while in theory vacatur could be transformed into a substantive rule if stretched to its logical extreme, no state stretches it that far and thus preemption concerns do not arise.

B. Manifest Disregard is Not Part of the FAA

A corollary principle to this framework is that the manifest disregard prong also does not apply in state court, unless that state has adopted the test under state law. Most courts characterize this standard as nonstatutory, part of federal arbitration law but not part of the FAA. [FN173] *34 Because the need for preemption arises when the congressional statutory scheme of the FAA conflicts with state law, federal laws developed by the judiciary should not displace state arbitration law. In other words, as long as the federal common law does not reflect congressional intent, preemption is irrelevant. Thus, state courts should not apply that prong if, under state arbitration law, manifest disregard is not a recognized ground of vacatur.

This is consistent with conflict preemption principles. Because the manifest disregard standard supplements statutory grounds for vacatur, application of this ground can only make it easier for losing parties to upset the arbitration panel's findings and award. Thus, applying a state rule that precludes the manifest disregard ground cannot contradict the pro-arbitration policy of the FAA; to the contrary, by reducing the avenues to upset the arbitration outcome, the state rule supports the pro-arbitration policy. Therefore, state courts should not feel compelled to apply a manifest disregard standard to a vacatur motion on preemption grounds.

C. State Courts Should Apply State Vacatur Law Unless Those Grounds Conflict with the Substantive Principle of Arbitrability of the FAA

As discussed earlier, Professors Hayford and Palmiter provide a blueprint for states to preserve a role in arbitration federalism. [FN174] That blueprint expressly contemplates

that, on the issue of post-award judicial review, a matter within the FAA preemption "boundary," the states should play a useful role in setting the parameters of preemption while furthering the strong pro-arbitration national public policy. [FN175] I propose the following framework to meet these goals and to provide guidance to a state court deciding a motion to vacate:

> *35 1. The court must first determine whether the arbitration agreement is governed by the FAA, i.e., whether the underlying transaction involves commerce. Because the Supreme Court interprets that phrase extremely broadly, virtually any commercial transaction is likely to be controlled by the FAA. If the FAA does not govern, then the court need not examine issues of FAA preemption and can apply either the parties' chosen vacatur law or that court's state vacatur law.
>
> 2. If the parties' arbitration agreement includes a choice-of-law clause designating a particular state's law as governing the dispute, then, under that state's law of contract interpretation, the court must determine whether the clause refers to state substantive law governing the underlying contractual relationship, or whether it also includes state arbitration and/or procedural law governing the arbitration process. [FN176] The court's determination on this issue will then designate whether state law grounds of vacatur or section 10 of the FAA controls the motion to vacate.
> 3. If the parties' arbitration agreement does not contain a choice-of-law clause, or the choice-

of-law clause does not include arbitration law, then the court must examine the state arbitration law setting forth grounds for vacatur and make a determination whether applying those grounds would conflict with the substantive principle of the FAA--to enforce parties' arbitration agreements according to their terms. If they do not, then the court can apply state vacatur law; if they do (e.g., if state law grounds provide for a broad de novo standard of review), then the court should apply section 10 of the FAA.

4. Even if the state court determines that the FAA applies, the court need not include the manifest disregard standard of review. Only if applicable state law includes manifest *36 disregard as a test should the state court apply that standard.

VI. CONCLUSION

Applying this framework to vacatur motions filed in state court should avoid over-preemption of state vacatur law. While many scholars have concluded that the Supreme Court's recent FAA jurisprudence has sounded the death knell for state arbitration law, state courts need not fear the preemptive effect of the FAA. Reducing the grounds available to vacate a multi-million dollar arbitration award can only strengthen the finality of arbitration awards, and fulfill parties' expectations that a choice of state vacatur law--either by contract through a choice-of-law clause in the pre-dispute arbitration agreement, or by filing a motion to vacate in state court--will result in the application of state law.

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[FN1]. See, e.g., Gary Young, Courts Are Increasingly Intervening in Arbitration Cases, NAT'L L.J., Feb. 28, 2003, at A15; Tamara Loomis, $25 Million Arbitration Award Is Upset, N.Y.L.J., Feb. 13, 2003, at 1 (reporting on Appellate Division's vacatur of punitive damages portion of $27 million arbitration award in Sawtelle v. Waddelle & Reed, Inc., 754 N.Y.S.2d 264 (N.Y. App. Div. 2003)); Tamara Loomis, Recent Ruling Vacates $28 Million Finding for Claimant, N.Y.L.J., Jan. 16, 2003, at 5 (reporting on Appellate Division, First Department's vacation of award in Sands Bros. & Co. v. Generex Pharmaceuticals, Inc., 720 N.Y.S.2d 450 (N.Y. App. Div. 2001)); Tom Perrotta, $5.7 Million Securities Arbitration Award Nullified, N.Y.L.J., Oct. 17, 2001, at 1 (reporting on Supreme Court's vacation of award in In re Arbitration Between UBS Warburg L.L.C. and Auerbach, Pollak & Richardson Inc., 744 N.Y.S.2d 364 (N.Y. App. Div. 2002)).

[FN2]. See infra notes 36-81 and accompanying text.

[FN3]. 9 U.S.C. § § 1-16 (2003).

[FN4]. Arbitrability refers to "whether the parties agreed to submit the claim to arbitration." Barbara Black, Securities Arbitration is Not Supposed To Be So Complicated: Arbitrability, the Eligibility Rule, and Whose Law Decides, 30 SEC. REG. L.J. 134, 137 (2002).

[FN5]. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[FN6]. 754 N.Y.S.2d 264 (N.Y. App. Div. 2003).

[FN7]. Id. at 273. Applying the United States Supreme Court's three-factor test set forth in BMW of North America v. Gore, 517 U.S. 559 (1996), the court ruled that the punitive damages award was grossly excessive in violation of the Due Process Clause of the United States Constitution. As a result, the court vacated the $25 million punitive damages portion of the $27 million award. Id. at 276. Surprisingly, on remand, the arbitration panel re-affirmed its $25 million punitive damages award, and explicitly stated that it granted the award pursuant to the claimant's claim under the Connecticut Unfair Trade Practices Act. SECURITIES ARBITRATION ALERT 2003-36. Again, in response to the claimant's motion to confirm the award, the respondent cross-moved to vacate the punitive damages award. The Supreme Court, New York County, vacated the award on the grounds that it "failed completely to take [the holding of the Appellate Division] into account" and directed parties to submit the issue of punitive damages to a new panel. See Sawtelle v. Waddell & Reed, Inc., No. 115056/01, slip. op. at 3 (N.Y. Sup. Ct. Jan. 22, 2004).

[FN8]. Sawtelle, 754 N.Y.S.2d at 273.

[FN9]. 749 N.Y.S.2d 17 (N.Y. App. Div. 2002). Sands Bros. involved a dispute arising out of a financial services agreement between a brokerage firm and a start-up company. The agreement did not contain a predispute arbitration clause, but the lower court compelled Sands Bros. to arbitrate the dispute pursuant to New York Stock Exchange (NYSE) rules

because Sands Bros. is a NYSE member. Telephone Interview with Richard A. Roth, Esq., Counsel for Sands Bros. (Sept. 29, 2003).

[FN10]. See Sands Bros. & Co. v. Generex Pharms., Inc., 720 N.Y.S.2d 450 (N.Y. App. Div. 2001). The arbitration panel had ordered Generex to pay $28 million in damages (mostly made up of lost profits) and to issue certain warrants to Sands. After the Supreme Court confirmed the award, this opinion of the First Department vacated the declaratory judgment portion of the award directing the issuance of warrants because it was too indefinite. Id. at 451. Interestingly, in this earlier opinion, the First Department applied both FAA and state statutory grounds to modify the lower court's confirmation of the award and remanded it back to the arbitrators for further findings. Id.

[FN11]. Sands Bros., 749 N.Y.S.2d at 18; N.Y. C.P.L.R. § 7511 (McKinney 2003).

[FN12]. 744 N.Y.S.2d 364 (N.Y. App. Div. 2002).

[FN13]. See In re Arbitration Between UBS Warburg L.L.C. and Auerbach, Pollak & Richardson, Inc., No. 119163/00, 2001 WL 1586978 (N.Y. Sup. Ct. Oct. 2, 2001); see also N.Y.L.J. Oct. 22, 2001, at 21.

[FN14]. UBS Warburg, 744 N.Y.S.2d at 364.

[FN15]. See Stephen L. Hayford & Alan R. Palmiter, Arbitration Federalism: A State Role in Commercial Arbitration, 54 FLA. L. REV. 175, 202-04 (2002).

[FN16]. Professors Hayford and Palmiter have attempted this reconciliation, and have outlined a "blueprint" of "arbitration

federalism"--FAA preemption principles for states to follow in deciding various arbitration-related issues to respect Supreme Court FAA jurisprudence, preserve a role for their own state's arbitration laws, and respect the national policy favoring arbitration. This "blueprint" identifies issues in three spheres, each of which preserves a different role for state law: the preemptive core, the preemptive boundary, and the preemptive penumbra. See id. at 193-208.

[FN17]. Section 11 of the FAA, provides additional grounds for modifying or correcting an award.

[FN18]. Section 10(a) provides that:

[T]he United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration (1) Where the award was procured by corruption, fraud or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made ...."

9 U.S.C. § 10 (2003).

For an exhaustive analysis of federal courts' interpretation of these statutory grounds, see Stephen L. Hayford, Law in Disarray: Judicial Standard for Vacatur of Commercial Arbitration Awards, 30 GA. L. REV. 731, 745-63 (1996).

[FN19]. Forty-seven of fifty states (excluding Georgia, Alabama, and West Virginia), Puerto Rico and the Virgin Islands have adopted, in whole or in part, the Uniform Arbitration Act (UAA), which sets forth grounds for vacatur virtually identical to section 10 of the FAA. For the text of the UAA, see http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm (last visited February 17, 2004). While Georgia and West Virginia have not adopted the UAA, their arbitration codes include vacatur grounds. See Ga. Code Ann. § 9-9-13 (2003) (recently codifying "manifest disregard of the law" standard); W. Va. Code § 55-10-4 (2003). Alabama has no statutory grounds of vacatur; instead its courts rely on common law grounds exclusively. See Rayburn v. Bailes, 565 So. 2d 122, 125 (Ala. 1990).

[FN20]. For an extensive analysis of federal courts' interpretation on non-statutory grounds, see Hayford, supra note 18, at 763-801.

[FN21]. It is well-settled that the FAA does not confer subject-matter jurisdiction in federal court. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983). Thus, only parties with diversity or subject-matter jurisdiction on other grounds (e.g., a claim in admiralty) can file a motion to vacate in federal court. Cf. Greenberg v. Bear Stearns & Co., 220 F.3d 22, 26 (2d Cir. 2000) (recognizing general rule, but permitting a finding of jurisdiction on an investor's motion to vacate award based on claim arising under the federal securities laws when disposition of the matter "necessarily depends on resolution of a substantial question of federal law") (internal quotations omitted).

[FN22]. A corollary issue beyond the scope of this Article is whether parties may contractually expand the standards of judicial review of an award. Generally, state courts do not

allow parties to contractually provide for expanded court review. See, e.g., John T. Jones Const. Co. v. City of Grand Forks, 665 N.W.2d 698, 703-04 (N.D. 2003) (collecting cases). In contrast, the federal circuits are split. See, e.g., Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998-1000 (9th Cir. 2003) (en banc) (collecting cases on both sides of circuit split).

[FN23]. E.g., 1 IAN R. MACNEIL, RICHARD E. SPEIDEL, THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 10.8.2.4 (1999 Supp.) (stating that "[a]t present it is not possible to tell whether the Supreme Court will hold any section other than FAA § 2 explicitly to supersede state law in state-court proceedings" but also asserting that a state court's approach was "wrong" when it held its grounds for vacatur were not preempted because they did not differ from the FAA grounds); Hayford & Palmiter, supra note 15, at 176, 206-07 (acknowledging that the Supreme Court has recognized that the FAA speaks "ambiguously" on issues such as the preemptive scope of post-award judicial review and stating that it is an "interesting question" as to "whether state arbitration law could modify the grounds for vacatur"); Stephen L. Hayford, Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act, 2001 J. DISP. RESOL. 67, 74 (stating that there is no definitive Supreme Court case law specifying the preemptive effect of "back end" issues of the FAA, including vacatur under section 10(a), although predicting that preemption was "likely").

[FN24]. See Murray S. Levin, The Role of Substantive Law in Business Arbitration and the Importance of Volition, 35 AMER. BUS. L.J. 105, 110 (1997) (noting that most state statutes providing grounds for vacatur parallel those in the FAA).

[FN25]. See Barry Friedman, Valuing Federalism, 82 MINN. L. REV. 317 (1997) (cataloguing values of maintaining balance between state and federal law); see also Calvin Massey, Federalism and the Rehnquist Court, 53 HASTINGS L.J. 431 (2002) (discussing values of federalism and asserting that the Rehnquist Court has disregarded these important values in its preemption decisions).

[FN26]. While every circuit has adopted the manifest disregard test, some circuits interpret this standard far more strictly than others. Compare Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752, 762 (5th Cir. 1999) (permitting vactur for manifest disregard only for awards that "would result in significant injustice"), and Geo. Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2000) (allowing vacatur for manifest disregard only when an award directs the parties to violate the law), with Dawahare v. Spencer, 210 F.3d 666, 669 (6th Cir. 2000) (defining manifest disregard test to be when the relevant law is clearly defined and not subject to reasonable debate, and the arbitrators consciously chose not to apply it). See generally Barbara Black, The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?, 72 CINN. L. REV. 415 (2004).

[FN27]. The Eighth Circuit permits vacatur for manifest disregard "where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it." Gas Aggregation Servs., Inc. v. Howard, 319 F.3d 1060, 1069 (8th Cir. 2003).

[FN28]. See Edward D. Jones & Co. v. Schwartz, 969 S.W.2d 788, 794-95 (Mo. Ct. App. 1998) (citing Stifel, Nicolaus & Co. v. Francis, 872 S.W.2d 484 (Mo. Ct. App. 1994), as rejecting manifest disregard as ground for vacatur

in Missouri). The Schwartz court stated the test to be where the "arbitrators correctly understood and correctly stated the law but proceeded to ignore it." Id. at 795. The court confirmed the award on the merits.

[FN29]. See Hackett v. Milbank, Tweed, Hadley & McCloy, 654 N.E.2d 95 (N.Y. 1995).

[FN30]. The Second Circuit allows vacatur when (1) "the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators," (2) "once it is determined that the law [was] clear and plainly applicable, ... the law was in fact improperly applied, leading to an erroneous outcome," and (3) "once the first two inquiries [were] satisfied," the arbitrator subjectively knew of the law's existence and its applicability to the problem. Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389-90 (2d Cir. 2003).

[FN31]. If a state statute provides such broad grounds for vacatur as to amount to a de novo appellate review of the merits, then the statute arguably undermines the purpose of the FAA to ensure the enforceability and finality of arbitration awards. This argument is addressed infra notes 171-72 and accompanying text.

[FN32]. Quick & Reilly, Inc. v. Zielinski, 713 N.E.2d 739, 743 (Ill. App. Ct. 1999).

[FN33]. Geo. Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2000).

[FN34]. A close examination of federal courts' treatment of FAA preemption issues is beyond the scope of this Article because a federal court has far less occasion to consider

applying a state arbitration statute to a motion to vacate in federal court and because section 10 of the FAA expressly applies in federal court. For the federal approach to whether to interpret a choice-of-law clause to include grounds for vacatur, see infra note 93 and accompanying text.

[FN35]. This Article will not cover cases involving labor arbitrations governed by Section 301 of the Labor Management Relations Act. 29 U.S.C. § 185(a).

[FN36]. For general background on the preemption doctrine, see Susan Raeker-Jordan, The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows the Rule, 40 ARIZ. L. REV. 1379 (1998). For a more detailed review of the Court's modern commercial arbitration decisions, see Stephen L. Hayford, Commercial Arbitration In The Supreme Court 1983-1995: A Sea Change, 31 WAKE FOREST L. REV. 1 (1995).

[FN37]. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-20 (1985).

[FN38]. See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (recognizing a "liberal federal policy favoring arbitration agreements").

[FN39]. Id. at 24.

[FN40]. Id. at 25 n.32.

[FN41]. 9 U.S.C. § 2 (2003).

[FN42]. See Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (2003) (per curiam) (applying FAA to debt restructuring agreements as "involving commerce"); Howsam v. Dean

Witter Reynolds, Inc., 537 U.S. 79 (2002) (applying FAA to securities arbitrations); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74, 281 (1995) (interpreting the reach of the FAA broadly to all transactions "involving commerce" and stating that "'involving' is broad and is indeed the functional equivalent of 'affecting'").

[FN43]. MACNEIL, supra note 23, § 9.5.3 (asserting that courts should assume that all arbitrations are covered by the FAA unless a party shows otherwise).

[FN44]. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

[FN45]. Id. at 477 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The Court has identified three circumstances under which the Supremacy Clause (U.S. CONST. art. VI, cl. 2) preempts state law: (1) when Congress has, in its statutory language, made explicit its intent to preempt state law, (2) when a state law regulates conduct in a field that Congress intended federal law to govern exclusively ("field preemption"), and (3) when state law actually conflicts with federal law ("conflict preemption"). English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990). The Volt Court's quotation from Hines indicates that FAA preemption is a species of conflict preemption.

[FN46]. Id. at 478. This would remedy the historical judicial hostility to enforcing arbitration agreements.

[FN47]. For a fuller explanation of conflict preemption, see generally Patricia L. Bonze, Legislating Comity: Can Congress Enforce Federalism Constraints Through Restrictions on Preemption Doctrine?, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 239, 246-55 (2000-01); see also Hayford &

Palmiter, supra note 15, at 198 n.113 (discussing FAA preemption as a type of conflict preemption).

[FN48]. Justice Stevens' concurring opinion in Green Tree Financial Corp. v. Bazzle, 123 S. Ct. 2402 (2003), expresses this view. Id. at 2408 (Stevens, J., concurring). He would have voted to affirm the judgment of the Supreme Court of South Carolina because the application of South Carolina law, as agreed to by the parties to the arbitration agreement, does not conflict with the FAA. Id.; see also Eckstrom v. Value Health Inc., 68 F.3d 1391, 1393 (D.C. Cir. 1995) (refusing to preempt Connecticut statute providing time limit on filing of motion to vacate, where parties' arbitration agreement contained a Connecticut choice of law clause, because application of statute furthered pro-arbitration policies).

[FN49]. 465 U.S. 1 (1984).

[FN50]. Id. at 5.

[FN51]. Id. at 10.

[FN52]. The Southland Court noted that it had already stated in Moses H. Cone that "'[f]ederal law in the terms of the Arbitration Act governs that issue in either state or federal court.'" Id. at 13 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). However, it had never expressly held a state law to be preempted.

[FN53]. Id. at 12-16.

[FN54]. Id. at 21-36 (O'Connor, J., dissenting).

[FN55]. The primary proponent of this view is Professor Ian Macneil. See IAN R. MACNEIL, AMERICAN

ARBITRATION LAW 139-47 (Oxford Univ. Press 1992); see also Hayford & Palmiter, supra note 15, at 189-92.

[FN56]. 513 U.S. 265, 285-297 (1995) (Thomas, J., dissenting) (joined by Justice Scalia).

[FN57]. Justice Thomas reiterated this view in his lone dissents in Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996), and Green Tree Financial Corp. v. Bazzle, 123 S. Ct. 2402 (2003).

[FN58]. Hayfold & Palmiter, supra note 15, at 178 n.10.

[FN59]. E.g., Christopher R. Drahozal, In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act, 78 NOTRE DAME L. REV. 101 (2002); Margaret Harding, The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process, 77 NEB. L. REV. 397, 460-68 (1998) (while agreeing that the decision was "contrary to the bulk of the legislative history," nonetheless arguing that the decision was defensible on policy grounds).

[FN60]. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995).

[FN61]. See Bazzle, 123 S. Ct. at 2411; Citizens Bank v. Alafabco., Inc., 123 S. Ct. 2037 (2003) (per curiam). In Bazzle, a case about the availability of class-wide arbitration, like in preceding Supreme Court arbitration cases, numerous amici briefs were filed attacking the foundations of the preemption doctrine. Commentators predicted the Supreme Court granted certiorari in the case to provide a vehicle to limit or abdicate the FAA preemption doctrine. See, e.g., Justin Kelly, Professors Urge Supreme Court to Overturn

Southland Decision, ADRworld.com (March 25, 2003), available at http://www.adrworld.com (last visited September 23, 2003). Those predictions were unfounded, as the plurality opinion did not mention preemption.

[FN62]. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (Montana statute requiring specific type of notice in contract containing arbitration clause); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) (New York law precluding arbitrators from awarding punitive damages); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (Alabama statute invalidating pre-dispute arbitration agreements in consumer contracts); Perry v. Thomas, 482 U.S. 483 (1987) (California statute requiring wage collection actions to be resolved in court).

[FN63]. Hayford & Palmiter, supra note 15, at 195.

[FN64]. Id.

[FN65]. 482 U.S. 483 (1987).

[FN66]. Id. at 490.

[FN67]. Casarotto, 517 U.S. at 683-89. For a detailed discussion of the background and subsequent history of Casarotto, see Harding, supra note 59, at 405-25.

[FN68]. INK"http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1996118397&ReferencePosition=687"Casarotto, 517 U.S. at 687.

[FN69]. YPERLINK"http://www.westlaw.com/

Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1989032283"489 U.S. 468 (1989).

[FN70]. Id. at 470 (quoting the parties' construction contract).

[FN71]. CAL. CIV. PROC. CODE ANN. § 1281.2(c) (1989).

[FN72]. Volt, 489 U.S. at 471-72.

[FN73]. 9 U.S.C. § 4 (2003).

[FN74]. Volt, 489 U.S. at 477-78.

[FN75]. Id. at 479.

[FN76]. INK"http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=9USCAS4&FindType=L"Id.

[FN77]. 514 U.S. 52 (1995).

[FN78]. Id. at 54-55 (citing Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354 (1976)).

[FN79]. Id. at 54.

[FN80]. Id. at 62 (quoting Volt, 489 U.S. at 476).

[FN81]. Id. at 60 n.4.

[FN82]. See Note, An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption, 115 HARV. L. REV. 2250 (2002).

[FN83]. See, e.g., Thomas A. Diamond, Choice of Law Clauses and Their Preemptive Effect upon the Federal Arbitration Act: Reconciling the Supreme Court with Itself, 39 ARIZ. L. REV. 35, 56-58 (1997).

[FN84]. Id.

[FN85]. Id. at 61 ("If a state rule of arbitration procedure is implicated, Volt applies. If a state rule of arbitration substance is implicated, Mastrobuono applies.").

[FN86]. Hayford & Palmiter, supra note 15, at 199 (quoting Mastrobuono, 514 U.S. at 56).

[FN87]. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996) (noting that Volt involved a state procedural rule that determined "only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself").

[FN88]. Hayford & Palmiter, supra note 15, at 194-95 (identifying "preemptive core"--substantive state laws that "invalidate arbitration agreements or limit the matters that can be arbitrated" as clearly preempted by the FAA); Harding, supra note 59, at 468-72 (collecting cases).

[FN89]. Professor MacNeil argues that the FAA should govern arbitration exclusively and that there should be no role for state arbitration law in arbitrations governed by the FAA. MACNEIL, supra note 23, § 10.8.2.2. He asserts that FAA exclusivity would (1) "avoid courts' mistakenly allowing state arbitration law to limit or obstruct the FAA"; (2) simplify the landscape of arbitration law; (3) avoid confusion in cases involving both federal and state law claims; and (4) preclude the risk that state and federal courts would develop different

FAA arbitration law, as state courts would draw on the FAA only to fill gaps in coverage. He also recognises , however, that FAA exclusivity is not the current state of the law and that there is some, albeit confused, role for state arbitration law in FAA arbitrations, as long as it does not undermine the FAA's goals and policies. Id. § 10.8.2.3.

[FN90]. Professor Diamond notes that "[s]tate rules that prescribe the manner in which arbitration is to be conducted are procedural" and that "[s]tate rules that limit arbitrators' authority by denying them the power to resolve a particular dispute or grant a particular remedy are substantive." Diamond, supra note 83, at 61-62.

[FN91]. See Charles Davant IV, Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act, 51 DUKE L.J. 521, 523 (2001) (arguing that federal courts improperly "invent" and apply a federal common law of contract instead of state law of contract on threshold question of arbitrability).

[FN92]. See Stone & Webster, Inc. v. Baker Process, Inc., 210 F. Supp. 2d 1177, 1182 (S.D. Cal. 2002) ("A general choice-of-law clause will only be construed as incorporating state substantive laws, NOT state procedural laws."); Jeereddi A. Prasad, M.D., Inc. Ret. Plan Trust Profit Sharing Plan v. Investors Assocs., Inc., 82 F. Supp. 2d 365 (D.N.J. 2000) (ruling that generic choice of law clause does not incorporate state statute of limitations for filing a motion to vacate). But see Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322 (2d Cir. 2004) (following Volt and construing generic California choice-of-law clause to incorporate a provision of California arbitration law deemed to be procedural).

[FN93]. See Sovak, M.D. v. Chugai Pharm. Co., 280 F.3d 1266, 1270, amended by 289 F.3d 615 (9th Cir. 2002) (stating "a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration"); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001) (crafting a default rule that if the parties' choice-of-law clause does not indicate parties' intent to opt out of FAA, then FAA rules apply); AT&T PERLINK"http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=6538&FindType=Y&ReferencePositionType=S&SerialNum=2001322185&ReferencePosition=787"Co. v. United Computer Sys., Inc., No. 99-56846, 2001 WL 389451, 7 Fed. Appx. 784, 787 (9th Cir. Feb. 7, 2001) (stating that FAA, not New Jersey law, provides grounds for vacatur motion because such grounds "affects the allocation of authority between courts and arbitrators"); Jacada (Europe) Ltd. v. Int'l Mktg. Strategies, Inc., 255 F. Supp. 2d 744 (W.D. Mich. 2003). But see Int'l Techs. Integration, Inc. v. The Palestine Liberation Org., 66 F. Supp. 2d 3, 9-10 (D.D.C. 1999) (applying Virginia grounds to a motion to vacate where arbitration agreement contained generic Virginia choice-of-law clause).

[FN94]. See, e.g., Belmont Constructors, Inc. v. Lyondell Petrochemical Co., 896 S.W.2d 352, 355 (Tex. Ct. App. 1995) (stating that "federal procedure does not apply in Texas courts, even when Texas courts apply the [FAA]"); Marr v. Smith Barney, Harris, Upham & Co., 842 P.2d 801 (Or. Ct. App. 1992) (holding that FAA does not preempt Oregon law precluding interlocutory appeal from order compelling arbitration); McClellan v. Barrath Constr. Co., 725 S.W.2d 656, 658 (Mo. Ct. App. 1987) (stating that "the procedural provisions of the [FAA] are not binding on state courts"); cf. Baxter Health Care. Corp., v. Harvard Apparatus, Inc., 617 N.E.2d 1018, 1020 n.2 (Mass. App. Ct. 1993) (holding that

FAA does not preempt Massachusetts arbitration law that does not effect the validity or enforceability of the arbitration clause).

[FN95]. DeBaker v. Shah, 522 N.W.2d 268, 271 (Wis. Ct. App. 1994) (noting that Wisconsin grounds for vacatur and FAA "mirror each other" and are "nearly identical"). Professor MacNeil harshly criticizes this opinion as "wrong," claiming the Wisconsin Court of Appeals should have considered the possibility that the state grounds could have been different from those of the FAA. MACNEIL, supra note 23, § 10.8.2.

[FN96]. E.g., Wells v. Chevy Chase Bank, F.S.B., 768 A.2d 620 (Md. 2001) (collecting cases and holding that FAA does not preempt procedural state arbitration laws unless they discriminate against arbitration); Collins v. Prudential Ins. Co., 752 So. 2d 825, 828-29 (La. 2000) ("[S]tates are free to follow their own procedural rules regarding appeals, unless those rules undermine the goals and principles of the FAA."); S. Cal. Edison Co of Am. v. Peabody W. Coal Co., 977 P.2d 769 (Ariz. 1999) (same); Superpumper, Inc. v. Nerland Oil, Inc., 582 N.W.2d 647, 651 (N.D. 1998) (stating that "a state is not obligated to altogether ignore its own procedural requirements in light of the procedural aspects of the FAA, provided the state-enacted procedure does not defeat the rights granted by Congress"); Weston Secs. Corp. v. Aykanian, 703 N.E.2d 1185 (Mass. App. Ct. 1998); Manson v. Dain Bosworth Inc., 623 N.W.2d 610, 614 (Minn. Ct. App. 1998) (holding that FAA governs arbitrability of dispute and Minnesota law governs all other issues, including procedural ones); Duggan v. Zip Mail Servs., Inc., 920 S.W.2d 200, 203 (Mo. Ct. App. 1996) ("Our courts are not bound by the procedural provisions of the FAA and state procedural rules may be applied when arbitration is pursuant to the FAA.");

see also Suzanne H. Johnson, Note, FAA Pre-emption: When Should Conflicting State Law Be Pre-Empted by the FAA?, 1999 J. DISP. RESOL. 191 (analyzing Weston and concluding that court reached correct result by holding that FAA does not automatically preempt conflicting state procedural rules governing arbitration as long as they do not defeat the substantive body of law under the FAA).

[FN97]. Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061 (Cal. 1996) (ruling that FAA section 4 did not preempt California rule permitting use of a summary procedure on a motion to compel arbitration).

[FN98]. Manson, 623 N.W.2d at 613 (holding that state civil procedural rule requiring personal service of motion to vacate was not preempted by FAA section 12 permitting service by mail).

[FN99]. Wells, 768 A.2d at 625 (holding state appellate procedural rule deeming an order compelling arbitration to be a final and appealable judgment was not preempted by FAA section 16 governing appeals under the FAA); Collins, 752 So. 2d at 828-30 (ruling that section 16 did not preempt Louisiana rule precluding immediate appeal from order compelling arbitration); Weston Secs. Corp., 703 N.E.2d at 1188-90 (holding that FAA does not preempt Massachusetts arbitration statute's provision that did not permit an immediate appeal from an order compelling arbitration).

[FN100]. 1745 Wazee L.L.C. v. Castle Builders Inc., Nos. 01CA2560, 02CA0303, 2003 WL 21665020 (Colo. Ct. App. July 17, 2003); Waverlee Homes v. McMichael, 855 So. 2d 493 (Ala. 2003) (applying FAA standards to motion to vacate without discussion of preemption); Edward D. Jones & Co. v. Schwartz, 969 S.W.2d 788, 795 (Mo. Ct. App. 1998).

[FN101]. I chose these states because of the frequency of arbitration in them, the volume of arbitration decisions, the presence of a commercial center in the state, and to represent a cross-section of geographic regions in the country and states within different circuits. I referenced opinions from other states where they mirrored opinions in the illustrative state.

[FN102]. This section of the Article will not consider cases where the FAA arguably applied yet the state court did not consider the applicability of the FAA and thus assumed state law vacatur grounds controlled. E.g., Boyhan v. Maguire, 693 So. 2d 659, 663 (Fla. Dist. Ct. App. 1997) (applying state law vacatur grounds to dispute arising out of royalty agreement for services performed in another state); see also MACNEIL, supra note 23, § 9.5.4 (stating that "[s]tate courts often ... seem happily unaware that the FAA governs cases before them and apply state law (footnotes omitted)). Additionally, this section will focus on cases decided after Mastrobuono, as that decision, combined with Volt, altered the FAA preemption landscape.

[FN103]. E.g., Carpenter v. Brooks, 534 S.E.2d 641, 645 (N.C. Ct. App. 2000) (applying FAA grounds to motion to vacate without analysis of scope of preemption); Groceman v. Pulte Homes Corp., 53 S.W.3d 599, 601 n.2 (Mo. Ct. App. 2001) (holding that FAA grounds apply to all vacatur motions involving arbitrations where FAA applies).

[FN104]. E.g., Tim Huey Corp. v. Global Boiler & Mech., Inc., 649 N.E.2d 1358, 1361-62 (Ill. App. Ct. 1995) (applying Illinois vacatur statute because the FAA only preempts conflicting state law and parties' contractual choice of Texas law, which is identical to Illinois law, should be enforced under Volt).

[FN105]. See, e.g., First Mich. Corp. v. Mansour, No. 228521, 2002 WL 1011771 (Mich. App. May 17, 2002) (applying FAA grounds where PDAA designated FAA and New York law as governing); Hackett v. Milbank, Tweed, Hadley & McCloy, 654 N.E.2d 95 (1995) (New York choice-of-law clause); cf. Harding, supra note 59, at 409 n.73 and accompanying text (asserting that state courts faced with a choice-of-law clause must determine whether the parties intended to incorporate that state's arbitration law as well as substantive law).

[FN106]. 654 N.E.2d 95 (1995).

[FN107]. Id. at 97-100.

[FN108]. Id. at 97.

[FN109]. Id. at 100. CPLR section 7511 provides that, for a party who participated in or received notice of the arbitration, an award "shall be vacated ... if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of [Article 75], unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." CPLR § 7511(b)(1). Additional grounds exist for those who neither participated in nor received notice of the arbitration. CPLR § 7511 (b)(2). The Hackett court held that any other ground not listed in the statute is precluded, including manifest disregard, unless such

disregard is "'totally irrational or violative of a strong public policy' and thus in excess of the arbitrator's powers." Hackett, 654 N.E.2d at 100 (quoting Maross Constr. v. Cent. N.Y. Reg'l Transp. Auth., 488 N.E.2d 67 (1985)).

[FN110]. In New York, only an explicit choice of law clause will displace the FAA. For example, parties' membership in the New York Stock Exchange and their agreement to arbitrate pursuant to its Constitution and Rules is not enough. Salvano v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 647 N.E.2d 1298, 1301 (N.Y. 1995).

[FN111]. Hackett, 654 N.E.2d at 100.

[FN112]. Id. On the merits, the court reversed the lower court's vacatur, ruling that the award should not have been vacated on public policy grounds. Id. at 100-02.

[FN113]. E.g., Halikia v. Warburg Dillon Read L.L.C., 759 N.Y.S.2d 288 (N.Y. Sup. Ct. 2000) (confirming NYSE arbitration award on FAA grounds in employment dispute).

[FN114]. E.g., Sawtelle v. Waddell & Reed, Inc., 754 N.Y.S.2d 264 (N.Y. App. Div. 2003) (discussed supra, notes 6-8 and accompanying text) (stating that the FAA governs employment disputes in the securities industry and vacating punitive damages portion of an award in favor of a former employee under section 10 of the FAA and "manifest disregard of the law" test); Spear, Leeds & Kellogg v. Bullseye Secs., Inc., 738 N.Y.S.2d 27 (N.Y. App. Div. 2002) (vacating NASD award for manifest disregard of the law).

[FN115]. In re Engel v. Refco, Inc., 746 N.Y.S.2d 826 (N.Y. Sup. Ct. 2002) (applying FAA to customer claim

against futures trader in NFA arbitration where customer agreement specified Illinois law); In re R.C. Layne Constr., Inc. v. Stratton Oakmont, Inc., 651 N.Y.S.2d 973 (N.Y. App. Div. 1996) (applying FAA grounds where parties designated New York law); accord First of Mich. Corp. v. Mansour, No. 228521, 2002 WL 1011771 (Mich. App. May 17, 2002) (per curiam) (applying FAA despite parties' choice of New York law); Carpenter v. Brooks, 534 S.E.2d 641, 645 (N.C. Ct. App. 2000) (applying FAA grounds regardless of parties' choice of law).

[FN116]. See, e.g., In re Arbitration Between UBS Warburg L.L.C. and Auerbach, Pollak & Richardson, Inc., No. 119163/00, 2001 WL 1586978 (N.Y. Sup. Ct. Oct. 2, 2001), aff'd, 744 N.Y.S.2d 364 (N.Y. App. Div. 2002) (discussed supra, notes 12-14 and accompanying text) (vacating award in a securities dispute between brokerage firms and tersely noting that CPLR section 7511 governed the motion to vacate because the parties' arbitration agreement included a New York choice of law clause).

[FN117]. Sands Bros. & Co. v. Generex Pharms., Inc., 749 N.Y.S.2d 17 (N.Y. App. Div. 2002) (discussed supra notes 9-11 and accompanying text); In re Donald & Co. Secs., Inc. v. Jones, 270 A.D.2d 56 (N.Y. App. Div. 2000) (brokerage customer dispute); Markby v. Painewebber Inc., 650 N.Y.S.2d 950 (N.Y. Sup. Ct. 1996) (NYSE arbitration of broker's employment dispute); Republic N.Y. Secs. Corp. v. Lloyd, N.Y.L.J. 28, Oct. 27, 1997, at 28 (N.Y. Sup. Ct. 1997) (same); Berman v. Stratton Oakmont, Inc., N.Y.L.J., Oct. 18, 1996, at 34 (N.Y. Sup. Ct. 1996). In Sands, the parties' agreement contained a generic New York choice-of-law clause, but it did not contain a pre-dispute arbitration clause. Rather, Sand Bros. was compelled to arbitrate the dispute because it was a New York Stock Exchange member.

Thus, the parties could not have contemplated that its choice-of-law clause would include New York state arbitration law, as arbitration was not contemplated at the time the parties entered into their business arrangement. Telephone Interview with Richard Roth, Esq., Counsel for Sands Bros. (Sept. 29, 2003).

[FN118]. TEX. CIV. PRACT. & REM. CODE ANN. § 171.008 (Vernon 2003).

[FN119]. Mariner Fin. Group, Inc. v. H.G. Bossley, 79 S.W.3d 30, 32 (Tex. 2002).

[FN120]. E.g., Thomas James Assoc., Inc. v. Owens, 1 S.W.3d 315, 319 (Tex. App. 1999); Thomas v. Prudential Secs., Inc., 921 S.W.2d 847 (Tex. App. 1996); accord Warbington Constr., Inc. v. Franklin Landmark, L.L.C., 66 S.W.3d 853, 856 (Tenn. Ct. App. 2001); McKee v. Hendrix, 816 So. 2d 30, 32 (Ala. Civ. App. 2001).

[FN121]. Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244 (Tex. App. 2003) (applying FAA including manifest disregard standard).

[FN122]. Tuco, Inc. v. Burlington N. RR Co., 912 S.W.2d 311 (Tex. App. 1995), modified on other grounds, 960 S.W.2d 629 (Tex. 1997).

[FN123]. J.D. Edwards World Solutions Co. v. Estes, 91 S.W.3d 836, 839-40 (Tex. App. 2002).

[FN124]. Fla. Stat. Ann. § 682.13 (West 2003). Florida courts do not allow vacatur for grounds other than those set forth in the statute (arbitrator misconduct or procedural errors), and will not set aside an award for "mere errors of

judgment either as to the law or as to the facts." Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327, 1328 (Fla. 1989).

[FN125]. E.g., Avatar Props., Inc. v. N.C.J. Inv., 848 So. 2d 1259 (Fla. Dist. Ct. App. 2003); Soler v. Secondary Holdings, Inc., 832 So. 2d 893 (Fla. Dist. Ct. App. 2002); Dadeland Square, Ltd. v. Gould, 763 So. 2d 524 (Fla. Dist. Ct. App. 2000); Flavio Dev. Corp. v. Laguna E. Club, 756 So. 2d 186 (Fla. Dist. Ct. App. 2000). The leading case is Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 751 So. 2d 143 (Fla. Dist. Ct. App. 2000), in which the court recognized, on the issue of the arbitrability of an attorney's fees award, that the FAA preempts only inconsistent state law. With respect to vacatur grounds, however, the court did not discuss FAA preemption, but applied state law grounds without discussion.

[FN126]. World Invest Corp. v. Breen, 684 So. 2d 221, 222 n.1 (Fla. Dist. Ct. App. 1996). In support, the court cited a 1981 case as holding that the FAA "supersedes the Florida Arbitration Act where interstate commerce is involved." Id. (citing Merrill Lynch, Inc. v. Melamed, 405 So. 2d 790 (Fla. Dist. Ct. App. 1981)). Melamed stated, however, that the FAA "supplants inconsistent state laws," not the entire Florida Act without regard to its consistency with the FAA. Id. at 793 (emphasis added).

[FN127]. Ga. Code Ann. § 9-13 (2003).

[FN128]. E.g., Galindo v. Lanier Worldwide, Inc., 526 S.E.2d 141, 146 (Ga. Ct. App. 1999); Hilliard v. J.C. Bradford & Co., 494 S.E.2d 38, 41 (Ga. Ct. App. 1997) (noting that parties had not agreed to the application of any state's law). These courts both cite a pre-Volt/Mastrobuono

Georgia case, Hilton Construction Co. v. Martin Mechanical Contractors, Inc., 308 S.E.2d 830 (Ga. 1983), which ruled that the FAA applies to motions to vacate.

[FN129]. Grounds for vacating an arbitration award can be found in section 12 of Illinois' Act. 710 ILL. COMP. ST. ANN. 5/12 (West 2003).

[FN130]. E.g., Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 692 N.E.2d 1167, 1171 (Ill. 1998); Quick & Reilly, Inc. v. Zielinski, 713 N.E.2d 739, 742 & n.1 (Ill. App. Ct. 1999); Ryan v. Kontrick, 710 N.E.2d 11, 14 (Ill. App. Ct. 1999).

[FN131]. Rauh v. Rockford Prods. Corp., 574 N.E.2d 636, 643 (Ill. 1991) (holding that Illinois Arbitration Act, not FAA, provides grounds for vacatur motion "[u]nder the [unspecified] circumstances of the instant case").

[FN132]. Since Illinois recognizes "manifest disregard" as a state law ground for vacatur, Quick & Reilly, 713 N.E.2d at 743, a preemption argument is significant, because the Seventh Circuit's interpretation of "manifest disregard" is extremely narrow. Geo. Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2000).

[FN133]. 649 N.E.2d 1358 (Ill. App. Ct. 1995).

[FN134]. Id. at 1361.

[FN135]. Id. at 1362. Because neither party cited Texas vacatur cases in its brief, but cited only federal and Illinois cases, and because the court noted that Texas and Illinois grounds for vacatur were identical as derived from the

Uniform Arbitration Act, the court cited Illinois cases in its decision. Id.

[FN136]. ERLINK"http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3484&FindType=Y&SerialNum=1998237082"79 Cal. Rptr. 2d 726 (Cal. Ct. App. 1998).

[FN137]. Id. at 729.

[FN138]. Id. at 730.

[FN139]. Id. at 732.

[FN140]. Id. at 731.

[FN141]. Id. at 732.

[FN142]. Id. at 737.

[FN143]. Id. at 740; see also Paul Turner, Preemption: The United States Arbitration Act, The Manifest Disregard of the Law Test for Vacating an Arbitration Award, and State Courts, 26 PEPP. L. REV. 519 (1999) (written by author of Siegel opinion and mirroring, but not citing, Siegel opinion).

[FN144]. The Siegel court did not mention the existence of a choice-of-law clause in the arbitration agreement, and, presumably, there was none. Under the court's analysis, the presence of a choice-of-law clause would not have altered the decision, unless the parties expressly chose the FAA to govern. Since Siegel, at least one court in California has ruled that a generic choice-of-law clause incorporated California procedural law, including a provision in conflict with the

FAA. See Mount Diablo Med. Ctr. v. Health Net of Cal., Inc., 124 Cal. Rptr. 2d 607 (Cal. Ct. App. 2002).

[FN145]. See also Barker v. Vulcan Chem. Techs., No. C038586, 2002 WL 1788557 (Cal. Ct. App. Aug. 5, 2002) (following Siegel and applying California law, not FAA, to motion to vacate in state court).

[FN146]. See Hayford, supra note 18, at 740-44.

[FN147]. KATHERINE V. W. STONE, ARBITRATION LAW 481 (Found. Press 2003).

[FN148]. See NCCUSL Background, Website, Uniform Law Commissioners (announcing its purpose is to "draft proposals for uniform and model laws on subjects where uniformity is desirable and practicable"), available at http://www.nccusl.org/nccusl/DesktopDefault.aspx?tabindex=0&tabid=1 (last visited April 8, 2004).

[FN149]. See Hayford, supra note 18, at 740-42. Any other result would transform arbitrators into a court lower on the hierarchy than trial courts, as the trial courts could then review the merits of the award for factual or legal errors.

[FN150]. Examples are provided supra notes 27-30 and accompanying text.

[FN151]. Massey, supra note 25; Friedman, supra note 25.

[FN152]. Friedman, supra note 25, at 386-404.

[FN153]. Massey, supra note 25, at 438-54.

[FN154]. Id. at 461.

[FN155]. See Stephen A. Gardbaum, The Nature of Preemption, 79 CORNELL L. REV. 767 (1994) (discussing constitutional basis of preemption). In my view, these concerns dwarf the concerns regarding the risk of forum-shopping. See supra notes 84 & 89 and accompanying text.

[FN156]. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) (emphasis added).

[FN157]. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996) (citing Volt, 489 U.S. at 479).

[FN158]. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[FN159]. MACNEIL, supra note 23, § 10.9.2 (acknowledging that a state arbitration law more favorable to arbitration than the FAA gives rise to no pre-emption objection).

[FN160]. This argument is also consistent with Professors Hayford & Palmiter's arbitration federalism blueprint. As they write, "[i]f the state provision is not hostile to arbitration--but seeks to rationalize the arbitral process by making it more expeditious, fair, or legitimate--the provision fits the blueprint." Hayford & Palmiter, supra note 15, at 204.

[FN161]. See discussion infra notes 171-72 and accompanying text.

[FN162]. 9 U.S.C. § 10 (2003) (emphasis added).

[FN163]. Hayford & Palmiter, supra note 15, at 195.

[FN164]. E.g., Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134- 35 (2002).

[FN165]. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 n.6 (1989) (citations omitted); see also Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 289-90 (Thomas, J., dissenting) (noting language of FAA sections, including section 10, on their face apply only in federal district court).

[FN166]. E.g., Stulberg v. Intermedics Orthopedics, Inc., 997 F. Supp. 1060, 1063 (N.D. Ill. 1998) (holding that the applicable standard of judicial review is a procedural issue); Atl. Painting & Contracting Inc. v. Nashville Bridge Co., 670 S.W.2d 841, 846 (Ky. 1984) (stating that "there is nothing in the Federal Arbitration Act ... remotely suggesting that the 'motion to vacate' procedure ... has any application at all to such state action" and holding that "procedural aspects [of the FAA] are confined to federal cases").

[FN167]. Indeed, modern arbitration statutes preserve the notion that judicial review of arbitration awards should be strictly limited to support the strong policy favoring arbitration and to further the objectives of the parties to resolve their disputes quickly, inexpensively, and with finality. See generally MACNEIL, supra note 23, § 40.1.4 (reviewing policies behind judicial reluctance to vacate, modify or correct awards).

[FN168]. Cf. Diamond, supra note 83, at 61-62 (defining as procedural the process for confirming an award).

[FN169]. E.g., AT&T v. United Computer Sys., Inc., No. 99-56846, 2001 WL 389451, 7 Fed. Appx. 784, 787 (9th Cir.

Feb. 7, 2001); Edward D. Jones & Co. v. Schwartz, 969 S.W.2d 788, 795 (Mo. Ct. App. 1998).

[FN170]. AT&T, 7 Fed. Appx. at 787 (stating that grounds for vacatur motion "affects the allocation of authority between courts and arbitrators"); Edward D. Jones & Co., 969 S.W.2d at 795 (holding that grounds for vacatur are substantive in nature, not procedural, because "they create, define and regulate rights").

[FN171]. See Hayford, supra note 18, at 741-42 ("The public policy reflected in the Federal Arbitration Act is intended to give effect to the bargain [of parties to forego resort to the courts in order to secure the benefits of arbitration] and to hold the parties to it by enforcing the agreement to arbitrate and making it very difficult to secure judicial vacatur of objectionable arbitration awards."); Amy Schmitz, Ending A Mud Bowl: Defining Arbitration's Finality Through Functional Analysis, 37 GA. L. REV. 123 (2002) (arguing for narrow review of awards to meet parties' expectations that arbitration has finality).

[FN172]. E.g., Moncharsh v. Heily & Blaise, 832 P.2d 899, 904 (Cal. 1992); Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co., 553 N.E.2d 1284, 1285 (Mass. 1990).

[FN173]. Hoeft, III v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003); Siegel v. Prudential Ins. Co. of Am., 79 Cal. Rptr. 2d 726, 739 (Cal. Ct. App. 1998) (collecting cases); Warbington Constr., Inc. v. Franklin Landmark, L.L.C., 66 S.W.3d 853 (Tenn. Ct. App. 2001) (declining to include manifest disregard as ground of vacatur under FAA); see also Julie K. Bracker & Larry D. Soderquist, Arbitration in the Corporate Context, 2003 COLUM. BUS. L. REV. 1, 18-19 (identifying "manifest disregard" as a common law,

nonstatutory ground of vacatur); Hayford, supra note 18, at 774-78, 810-19 (terming "manifest disregard" the "seminal nonstatutory ground for vacatur" but offering a theory to reconcile the standard with the FAA). But see Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987 (9th Cir. 2003) (en banc) (classifying "manifest disregard of the law" standard under section 10(a)(4) of the FAA--which permits vacatur where arbitrators "exceeded their powers"); Groceman v. Pulte Homes Corp., 53 S.W.3d 599, 602 (Mo. Ct. App. 2001) (holding that manifest disregard is a vacatur ground under the FAA); Int'l Bank of Commerce-Brownsville v. Int'l Energy Dev. Corp., 981 S.W.2d 38, 48 (Tex. App. 1988) (holding that parties' choice of FAA includes manifest disregard and noting that Texas law includes the analogous ground of "gross mistake").

[FN174]. See Hayford & Palmiter, supra note 15.

[FN175]. Id. at 178.

[FN176]. Practically speaking, this is a very subjective and difficult determination for a court to make, as parties rarely discuss the meaning of boilerplate language.

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Harvard Law Review
June, 2002

Note

An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption

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I. Introduction

In 1925, Congress passed the Federal Arbitration Act (FAA) n1 "to overcome courts' refusals to enforce agreements to arbitrate." n2 The FAA requires courts "to place arbitration agreements on equal footing with other contracts." n3 Thus, the FAA does not force parties to arbitrate n4 or even require them to do so under any specific set of rules; n5 rather, parties dictate the terms of their own contracts, and the FAA does no more than ensure that those terms are enforced. n6

Discerning the actual meaning of those contractual terms, however, becomes complicated when contracts are ambiguous. One ambiguity that has led to a particularly thorny question of contract construction is the generic choice-of-law clause, which appears in many contracts. n7 Courts have struggled to determine whether these clauses were intended to supply only the general substantive law of the selected forum, [*2251] or instead to supply both that forum's substantive law and its arbitration rules.

The Supreme Court has twice confronted cases presenting this dilemma. In the first case, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, n8

the Court held that an arbitration agreement's choice-of-law clause was intended to incorporate both state substantive law and state arbitration rules. n9 Six years later, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, n10 the Court reached what appeared to be the opposite conclusion, holding that the choice-of-law clause at issue incorporated only the substantive law, but not the arbitration rules, of the selected forum. n11

Lower courts have made little headway in resolving this confusion. n12 Relying on Volt and Mastrobuono, those courts have suggested a number of different solutions to the conflict, in the process often departing (albeit not expressly) from the Court's most basic FAA jurisprudence. Such departures, however innocent, raise significant issues beyond the immediate choice-of-law problem, as they further thrust the FAA into areas traditionally reserved for the states. Indeed, the FAA, once thought to govern merely federal court procedure, n13 is now interpreted by the Court to do far more than that, extending in both state and federal courts to the limits of Congress's power under the Commerce Clause. n14 Although the Court has placed limits on the FAA's eviction of state law, some lower courts addressing the problem have subtly expanded those limits, replacing state contract and arbitration law with federal "contract" rules and the FAA. As these cases show, how courts analyze the choice-of-law issue - whether they displace state contract law, state arbitration law, or both (thus touching on "areas traditionally regulated by the States" n15) - assumes an additional policy, and perhaps also a constitutional, dimension.

This Note addresses the thorny question of contract construction raised by the generic choice-of-law clause, and attempts to provide a step-by-step solution that fits within the Court's doctrine and respects the balance between federal and state interests. Part II explains the FAA's current doctrinal

framework, defining the role of state contract law, examining the scope of FAA preemption, and describing the two main cases - Volt and Mastrobuono - that have addressed generic choice-of-law clauses. This Part concludes that the Supreme Court's cases carefully draw a line between protecting the federal interest in arbitration and preserving local autonomy in an area traditionally reserved to the states. Those cases, however, have generated confusion among lower courts, and Part III traces the sources and effects of this confusion. This Part shows that some circuits have displaced state law when no countervailing federal interest was at stake, expanding (often inadvertently) the scope of FAA preemption through the guise of a federal common law of contract construction. Other circuits have created seemingly different rules for state and federal courts, at the risk of engendering forum shopping and undermining the basic purposes of the FAA. Part IV then offers a step-by-step solution to the choice-of-law problem. This solution suggests that courts apply state contract law and a properly limited form of FAA preemption to balance the pro-arbitration interests of the Act against the states' interests in applying their own laws to contracts within their jurisdiction. Part V concludes.

II. Doctrinal Backdrop

As a substantive rule of law that does not create independent federal question jurisdiction, n16 the FAA has proved difficult to master. n17 But despite some anomalies in the FAA's application, the Court has consistently applied background principles that operate to preserve the Act's limited purpose - enforcing arbitration agreements according to their terms n18 - without unnecessarily extending into and encroaching on the province of traditional state authority.

A. State Contract Principles and Contractual Intent

The limited purpose of the FAA is to place arbitration agreements on equal footing with other contracts. The Act thus requires courts to apply state contract principles to arbitration agreements, just as they would to any other contract. Following this requirement, the Supreme Court has consistently held that state contract rules govern the construction of arbitration agreements (with an exception for ambiguous [*2253] provisions, discussed below). n19 In this way, even though the FAA can be seen as "federalizing" contracts within its scope, n20 it does so without ignoring state law. Anything else - such as a special federal rule of contract construction - would frustrate the explicit purpose of the Act, "to make arbitration agreements as enforceable as other contracts, but not more so." n21 Because the federal interest begins, and ends, with ensuring that private agreements to arbitrate are enforced according to their terms, the federal government's very interest is in applying - and not displacing - traditional state contract law.

B. Preemption

The FAA preempts state law "to the extent that it actually conflicts with federal law - that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" n22 As noted above, the FAA's "purposes and objectives" are met when agreements are enforced according to their terms. FAA preemption thus targets anti-arbitration state laws that apply without regard to the intent of the parties, and requires courts to construe contractual ambiguities in favor of arbitration.

First, the FAA preempts all state laws that apply of their own force to limit arbitration agreements. For example, in *Doctor's Associates, Inc. v. Casarotto*, n23 the Court was faced with a Montana statute that declared arbitration clauses

unenforceable unless the contract provided notice of the arbitration clause "in underlined capital letters on the first page of the contract." n24 The Court held that law preempted by the FAA because it singled out - and invalidated - arbitration contracts [*2254] on grounds not generally applicable to "any contract." n25 The basic idea is that the FAA precludes state laws that thwart parties' attempts to arbitrate their disputes.

Second, and more complexly, the FAA also creates a sort of prophylactic around ambiguities in arbitration agreements. This preemption rule, developed by the Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, n26 requires that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." n27 As such, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." n28 This requirement not only serves as a functional check against state court efforts to construe contractual ambiguities against arbitration, but also ensures that even good-faith applications of state contract principles err on the side of arbitration. n29

This FAA preemption has three important caveats. First, although the FAA preempts state statutes that single out arbitration agreements for negative treatment, Moses H. Cone does not apply when statutes favor arbitration. Indeed, as the Court made clear in Volt, the FAA does not favor arbitration under any specific set of procedures, leaving states free to develop their own pro-arbitration procedures. n30 In that case, as discussed more fully below, n31 the Court refused to invalidate a state statute that was "manifestly designed to encourage resort to the arbitral process." n32 In reaching that conclusion, the Court demarcated the proper scope of Moses H. Cone preemption, mandating application of the FAA in the

face of contractual ambiguity only when the competing state statute would undermine the pro-arbitration spirit of the FAA. In that way, the FAA protects the federal interest in arbitration without unduly burdening state efforts to "take[] the lead in fashioning" legislative improvements to the arbitral process. n33 Rather than being locked into the "antiquated" procedures of the FAA, states are [*2255] free to try different rules that make arbitration more effective, without fearing FAA preemption. n34

Second, the Court just this Term again clarified the reach of Moses H. Cone, explaining that "absent some ambiguity in the agreement ... it is the language of the contract that defines the scope of disputes subject to arbitration." n35 Combining these two caveats, the Moses H. Cone presumption - and thus this aspect of FAA preemption - only applies to ambiguous provisions when the competing policy would actually disadvantage the parties' attempts to arbitrate their disputes. n36

Finally, although the Court has occasionally suggested that courts confronting arbitration agreements apply the "federal substantive law of arbitrability," n37 the Court has never questioned the role of state contract law in determining the intended meaning of arbitration agreements. First, again, the rule the Court established in Moses H. Cone was limited to ambiguous provisions; it did not suggest a total displacement of state contract law. n38 Second, considering that the FAA, as a substantive rule of law, applies in both state and federal court, it seems unlikely that Congress intended to displace state contract rules - an area traditionally left to the states - without making that intention explicit. n39 Third, the Court has consistently referred to state contract [*2256] law to determine the parties' intent; thus, whether the federal law is fashioned so as to "borrow" state contract principles, or

whether those principles apply of their own force, state contract principles have a clear role in state and federal court interpretation of arbitration agreements. Finally, the Court has repeatedly - and explicitly - relied on state contract principles in its analysis, n40 or approvingly cited state court applications of those principles. n41 As a result, even if the Court had at one point considered "federalizing" all contract rules for the many agreements that fall within the FAA's scope, the rule today is that general state contract principles, as is the tradition, provide the baseline for interpreting arbitration agreements. Accordingly, whereas the FAA does not create "a new federal contract law," it does modify state contract rules - but only to the extent necessary to further the Act's "liberal federal policy favoring arbitration agreements." n42

C. Volt and Mastrobuono

As mentioned above, the Supreme Court has twice encountered arbitration agreements with a generic choice-of-law clause, reaching a different result in each case: one finding that the clause incorporated the competing state provision, the other finding that the parties intended for state substantive, but not state arbitration, rules to apply.

First, in Volt, the Court reviewed a California state court's decision to apply a provision of the state's arbitration law to an agreement with a choice-of-law clause referencing California law. n43 The California statute at issue allowed courts to stay arbitration pending the resolution of certain related litigation. n44 The Court affirmed the state court's application of the provision, holding that "application of the California statute is not pre-empted by the Federal Arbitration Act ... in a case where the parties" selected California law to govern their agreement. n45

[*2257] After acknowledging that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review," n46 the Court explained that the FAA only requires that "arbitration proceed in the manner provided for in [the parties'] agreement." n47 As a result, the parties were limited to the rights found in their contract. Because the lower court found that the parties incorporated the state arbitration rule in their agreement, the FAA did not stand in the way of its enforcement; in fact, as a right conferred by the contract, the Act required it. n48

Having thus accepted the lower court's interpretation of the contract to incorporate state arbitration law, the Court next rejected the argument that such an interpretation would violate "the settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration." n49 Here, the Court explained that interpreting the choice-of-law clause to incorporate state arbitration rules that "generally foster the federal policy favoring arbitration" n50 "simply does not offend the rule of liberal construction set forth in Moses H. Cone, nor does it offend any other policy embodied in the FAA." n51 Because "there is no federal policy favoring arbitration under a certain set of procedural rules," n52 the lower court could interpret the ambiguous choice-of-law provision to incorporate pro-arbitration state rules (rather than the FAA) without violating the "federal substantive law of arbitrability." n53

Finally, the Court rejected the contention that the FAA preempts state laws inconsistent with its provisions even when the parties intended to include those conflicting state laws in their agreements. n54 The Court reasoned that the main purpose of the FAA is to ensure that agreements are enforced according to their terms. n55 As such, Congress surely did

not mean to preempt state laws affirmatively selected by the parties; indeed, the Court argued, "such a result would be quite inimical to the FAA's primary purpose" of honoring, and thereby enforcing, private party intent. n56

[*2258] Thus the Court in Volt reaffirmed the basic principles of the FAA. It applied (albeit vicariously) state contract law to determine the parties' intent, and having determined that intent, it enforced the contract according to its terms. Importantly, in addressing the Moses H. Cone principle, the Court clarified the scope of FAA preemption: when faced with ambiguity, the federal pro-arbitration policy did not require application of the FAA's procedures, but rather just any procedures, state or federal, that favor arbitration. In this way, the Court made clear that states could fashion their own pro-arbitration rules - and courts could apply those rules in ambiguous settings - without "offending the rule of liberal construction set forth in Moses H. Cone ... [or] any other policy embodied in the FAA." n57

The Court next faced a generic choice-of-law clause in Mastrobuono v. Shearson Lehman Hutton, Inc. n58 Unlike in Volt, the Court here rejected the argument that the choice-of-law provision incorporated a state arbitration rule - here a New York rule that precluded arbitrators, but not courts, from awarding punitive damages. n59

The heart of the Court's analysis tracked two lines of argument. First, the Court explained that "at most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards." n60 This ambiguity had to be "resolved in favor of arbitration" n61 and thus against the New York rule, which would limit the types of relief available in the arbitral forum. n62 Second, the Court reasoned that state law contract

principles also suggested that the parties did not intend to incorporate the New [*2259] York rule. n63 Citing precedent from Illinois and New York, n64 the Court concluded that the choice-of-law provision "encompassed substantive principles that New York courts would apply," but did not include "special rules limiting the authority of arbitrators." n65

The majority, responding to Justice Thomas's dissent, n66 distinguished Volt by simply stating that the Court independently applied state contract principles (as opposed to deferring to the lower court's application, as in Volt) because the case arose through the federal, rather than the state, system. n67 Equally important, the Court did not state that Volt's reasoning was limited to cases arising in state courts. Far from it: in both cases, the Court relied on state contract law in determining the parties' intent - only Volt did not question the state court's application of its own state law. n68

Nor did the Court declare that FAA preemption warranted a different rule in federal and state courts. Nothing so creative is necessary to explain the seemingly inconsistent results: In Volt, the state policy furthered the federal goal of encouraging arbitration, and thus Moses H. Cone did not require construing ambiguities toward applying the FAA. n69 In Mastrobuono, however, the policy at issue would have directly impeded the FAA's goals, thus triggering FAA preemption. n70 As a result, it should hardly be surprising that a choice-of-law clause, in [*2260] an agreement bound by the contract law and involving the arbitration rules of one state, happened to produce a different result than did a choice-of-law clause in an entirely different context.

III. Lower Court Confusion

In the wake of Volt and Mastrobuono, federal courts have developed a number of approaches to the choice-of-law question. Some courts have completely ignored state contract rules; others have too closely followed the Court's reasoning in Mastrobuono, applying Illinois and New York contract law to the contract at issue - regardless whether that contract had any ties to those states. Other courts have read Mastrobuono as mandating a categorical exclusion of state law - whether pro-or anti-arbitration - unless the contract language expressly departed from the FAA; still others have similarly relied on Volt to require application of the competing state rule. The resulting confusion has produced a morass of inconsistent principles, expanding FAA preemption into areas traditionally reserved for the states, and departing from Congress's intent to place arbitration agreements on "equal footing" with all other contracts. This Part tracks the courts' differing treatments of state contract law, FAA preemption principles, and Supreme Court precedent when addressing the deceptively complex question posed by generic choice-of-law clauses.

A. Federal Default Rules

Perhaps the most common approach to the choice-of-law problem has been to hold that courts cannot read choice-of-law provisions to opt parties out of the FAA default regime. For example, in Porter Hayden Co. v. Century Indemnity Co., n71 the Fourth Circuit read Mastrobuono as "squarely rejecting the argument that a federal court should read a contract's general choice-of-law provision as invoking state law of arbitrability and displacing federal arbitration law." n72 Instead, the court held that "absent a clearer expression of the parties' intent to invoke state arbitration law, we will presume that the parties intended federal arbitration law to

govern the construction of the Agreement's arbitration clause." n73

Similarly, the Eighth Circuit has held that it would "not interpret an arbitration agreement as precluding the application of the FAA unless the parties' intent that the agreement be so construed is abundantly clear." n74 The Ninth Circuit has reached the same conclusion, [*2261] even excluding application of the identical California arbitration provision that was upheld, and applied, in Volt. n75 Likewise, the Third Circuit has adopted a default rule that a generic choice-of-law clause is per se insufficient to place a contract outside the FAA's regime. n76

The courts apply these default rules to all choice-of-law clauses, and thus ignore the traditional application of state contract law in determining the meaning of a contract. n77 More importantly, this approach also requires courts to apply the FAA even when the otherwise applicable state law would not undermine the FAA's substantive policies. n78 In other words, this default rule supplants state law on two fronts: it displaces state principles of contract construction, n79 even though those principles are applied to all other contracts; and it displaces state arbitration rules and procedures - even when those rules and procedures would not interfere with the parties' attempts to arbitrate, and thus even when the state rules would not undermine the primary (or indeed, any) purpose of the FAA. n80 By construing the FAA in a manner that categorically evicts state law, these courts have created a number of problems.

1. "Super" Preemption. - The lower courts' foray into federal common law has unnecessarily displaced traditional state law. n81 Congress enacted the FAA to reverse hostility toward arbitration; and to effectuate this intent, the Court has

found that the FAA preempts state procedures that require parties, against their will, to limit the arbitrability of their claims. However, quite different is a rule, as found here, that precludes the application of state substantive law even when that [*2262] law would not affect the parties' ability to arbitrate. Indeed, these circuits' default rule would foreclose the application of state law even when that law would further arbitration - a rule that runs contrary both to the purposes of the FAA n82 and to basic principles of federalism. n83 As the Court made clear in Volt, Congress did not intend to require all arbitration to proceed only by the procedures outlined in the FAA; states are also free to create their own procedures, as long as those procedures further, rather than frustrate, the goals of the Act. n84 That intent notwithstanding, the federal default rules created by these circuits would stifle state participation in an area in which that participation is traditionally strong, by extracting a set of cases from the states for exclusive adjudication under the FAA. These judge-made rules frustrate the FAA's goals by reducing a state's ability - and incentive - to experiment with new and more efficient arbitration procedures. n85 Even though a state would still be able to apply its rules in cases that fell outside the FAA's scope, and in cases where the parties clearly expressed an intent to incorporate the state's rules, the state has an interest in applying its rules in all instances when there is no competing federal interest at stake - yet such a default rule ignores that state interest, applying the FAA even though the state statute might not be preempted under the Court's doctrine.

In addition to displacing state substantive law, these judge-made "default" rules also fail to acknowledge the important role of state contract law in interpreting contractual terms. Rather than rely on state contract principles - as did the Court in Volt and Mastrobuono - these courts wholly replace those

principles with a strict presumption that lacks the equitable features of traditional state contract law. Indeed, such rules discard state contract principles that have been time-tested to ascertain a party's likely intent in the face of uncertainty, as [*2263] well as to balance the equities in forcing certain parties to "assume the risk" of contractual ambiguity. n86 This intrusion into state law, effectively preempting contract principles through federal "contract" law, finds no justification in the FAA's preemption doctrine - in fact, it runs directly counter to it. n87

2. Respecting the Federal-State Balance. - Judge-made default rules that rigidly extend beyond the proper scope of FAA preemption are not only wrong as a matter of doctrine; such rules also disturb the balance between the states and the federal government. Outside the limited instance of reading ambiguity to ensure the enforceability of arbitration agreements, federal courts have usually deferred to state rules of contract construction. And courts have also applied state arbitration laws consistent with the goals of the FAA. In these cases, however, the circuits' rules would displace both state contract and state arbitration law, even with no federal interest at stake. n88 Moreover, these judge-made rules even apply when the state rule of contract construction would itself favor application of the FAA and thus obviate the need to engage the Moses H. Cone analysis. Instead, these default rules expand FAA preemption without serving the purposes of the Act, and in so doing, undermine Congress's interest in enforcing the intent of the parties while respecting the discrete roles of federal and state courts in enforcing arbitration agreements.

Underscoring the differences between these roles is the lack of federal question jurisdiction in suits where only the FAA is involved. n89 Often, these disputes only enter federal

court through the "accident" of diversity jurisdiction. This suggests that Congress, when enacting the FAA, did not intend for federal courts to step in and develop their own [*2264] set of federal common law contract principles - at least beyond what is necessary to preserve the policies of the FAA. Even though the Court already applies the FAA in state courts, n90 these federalism concerns counsel against a further "permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes." n91

3. Forum Shopping: the Erie Problem. - Moreover, it is not clear that these default rules were meant to apply in both state and federal courts. Either way, however, the rules create problems.

Suppose, on the one hand, that the rules were limited to federal courts. n92 In that case, by creating different law in federal and state courts, the rule would open the door for forum shopping, and thus contradict the goals of the FAA. n93 Congress designed the FAA to effectuate the intent of the parties when the contract was formed. If, however, parties are given an incentive to forum shop - which is what would happen if the pro-FAA default rule applied only in federal courts - then, perversely, a litigant's after-the-fact intent would govern the dispute. If a litigant wanted the state rule to apply, she could file in state court; if she wanted the FAA to govern, she could rely on the rule in federal court. Such manipulation would frustrate the FAA's primary goal of ensuring that agreements to arbitrate are enforced according to their terms - not according to a litigant's choice of forum. In any event, it is far from clear that these courts even could limit their default rule to the federal forum: because these default rules are based in part on Moses H. Cone, and because Moses H. Cone preemption is substantive (and thus

applicable in both state and federal court), these rules would have to extend to all courts, state and federal. n94

[*2265] Accordingly, now suppose, on the other hand, that the pro-FAA default rule applies in both state and federal courts. In that case, the federalism concerns are magnified, as the FAA is forced upon state courts. n95 Moreover, the application of such a rule in state courts would become immediately inconsistent with Volt, which had no problem applying a pro-arbitration state rule to an ambiguous arbitration agreement. Indeed, because Volt would have come out the opposite way under these judge-made default rules, these circuits are effectively undoing Supreme Court precedent. n96 And they are doing so without the justification of any newly arisen federal interest.

4. Following Precedent. - Finally, the federal default rules flatly ignore the Supreme Court's holding that the FAA preempts state law only when applying that law to an ambiguous contract would undermine the substantive policies of the FAA. n97 As described above, the lower courts' sweeping judge-made FAA "prophy ctic" aggressively extends federal preemption beyond what is required to protect the FAA's mandate. Although such a rule might reduce the administrative burden of determining the parties' intent under state contract law, or of comparing the state's substantive law with the competing principles of the FAA, administrative ease alone does not justify expanding the proper scope of FAA preemption beyond that authorized by Congress and explained by the Court; it certainly does not justify the flagrantly self-conscious breadth of such a judge-made rule. In sideswiping even those state rules and procedures that advance and encourage arbitration, these circuits misunderstand, and in turn misapply, the mandate of Volt and Mastrobuono.

First, neither Volt nor Mastrobuono held that the FAA permitted (let alone required) courts to displace all state substantive law in the face of contractual ambiguity. Rather, both cases emphasized the need to compare the state rule with the FAA policy to determine whether the former would undermine the latter. n98 Second, far from displacing [*2266] state principles of contract construction, both Volt and Mastrobuono applied state contract principles in reaching their results. If, for example, the Volt case had originated in federal court, the Volt majority presumably would have reached the same conclusion by applying state contract principles de novo (the goal of the federal diversity court, after all, is to reach the result that the state court would have reached). Again, neither case looked to develop a general federal "contract law" - to have done so would have undermined the Act's express purpose to put arbitration agreements "on equal footing" with all other contracts. Instead, in both instances the Court applied a narrow preemption principle, required only to avoid application of anti-arbitration policies in the face of ambiguity. Accordingly, although superficially anchored to Supreme Court precedent, these pro-FAA default rules actually effect a significant (if subtle) departure.

B. Ignoring State Contract Law

The Supreme Court has expressly directed courts to apply state contract law to arbitration agreements. n99 Indeed, as explained above, that requirement inheres in the FAA: the Act's basic purpose is to treat arbitration agreements the same as any other contract. That purpose also respects the basic division of authority between states and the federal government; although Congress can certainly reach arbitration agreements through its Commerce Clause power, federalism interests and comity suggest that, as a matter of policy, it

should displace as little state law as possible. In any event, the Court has generally been reluctant to interfere in an area of traditional state authority without explicit statutory authorization; here, such authorization begins and ends with the purpose of enforcing arbitration agreements according to their terms - a purpose that does not require arbitration under the specific procedures set out in the FAA, and one that certainly does not require a set of generic federal contract rules. Nonetheless, lower courts have failed to apply the relevant state contract law in two ways.

1. Ignoring All Forms of State Contract Law. - Some lower courts have altogether ignored their obligation to apply state contract law. These courts have instead imposed mandatory default rules that avoid any contractual inquiry (the failings of which were discussed above), or have simply cited Mastrobuono as resolving the meaning of generic choice-of-law clauses for all contracts. n100 Mastrobuono, however, did [*2267] not hold as a matter of federal law that choice-of-law agreements cannot be read to incorporate both state substantive and arbitral law. In fact, the Court could not have reached that holding without discarding FAA precedent. If Mastrobuono, as read by these lower courts, applies in both state and federal courts, then the Court would have been forced to overturn Volt, which upheld a state court's decision to incorporate both state substantive and arbitral law. The Mastrobuono majority, however, explicitly disclaimed any intent to disturb the result in Volt and cited the opinion liberally throughout its analysis.

As a result, these lower courts must assume that Mastrobuono only applies in federal court. Although this assumption would (correctly) leave Volt intact, a number of other problems would ensue. First, Moses H. Cone does not support this limited holding, notwithstanding Mastrobuono's

extensive discussion of it in the opinion: Because Moses H. Cone preemption is rooted in a substantive right n101 that applies "in either state or federal court," n102 any holding based on it must extend to state courts, which this reading of the case would not allow. Thus, these lower courts would have to read Mastrobuono as based on general federal common law principles unrelated to Moses H. Cone and the substantive power of the FAA. On this reading, though, the courts would run afoul of an animating principle of *Erie Railroad Co. v. Tompkins*. n103 Such a rule would promote forum shopping, a result the Court was careful to avoid in *Southland Corp. v. Keating, Inc. n104 and Allied-Bruce Terminix Cos. v. Dobson*. n105

Accordingly, the "absolutist" approach - the claim that Mastrobuono foreclosed reading a choice-of-law clause to incorporate state arbitration law - would require either overturning Volt, which the Court did not do, or creating a rule applicable only in federal courts, which the Court will not allow. As a result, Mastrobuono must be read at face value: it was simply a decision that applied the basic Moses H. Cone rule to construe ambiguous contract language against a [*2268] state law that disfavored arbitration, and relied on traditional state contract principles - those relevant to the contract in dispute - to determine the meaning of the parties' agreement (a meaning that happened to suggest that the state rule was not meant to apply). Despite their insistence, courts that ignore state contract law thus do so without any basis in FAA preemption or support in Mastrobuono.

2. Applying "Mastrobuono" Contract Law. - Although some courts ignore state law, others have applied state contract law - only the law of the wrong states. Rather than focusing on the contract rules of states with connections to a dispute, these courts have applied the exact same contract

principles used in Mastrobuono, thereby inadvertently applying Illinois and New York contract law to disputes with no (or only a fortuitous) connection to those states. n106 These lower courts have done so without explanation and without independently determining whether the state-law principles cited by the Mastrobuono Court were the ones used by states with connections to their case. n107 Such a result - likely premised on the incorrect notion that Mastrobuono developed a body of general federal contract law - was not intended by that Court. Indeed, Mastrobuono was careful to show that state contract principles should apply, n108 and specifically explained that it chose New York and Illinois law because of their connection to the contract in that case. n109 Without commenting on the general quality of New York and Illinois contract law, it seems unlikely that the Court would have fashioned a general federal rule based on those states' law simply because they happened to have connections to the one dispute then before the Court. It thus makes no sense for courts to apply "Mastrobuono contract law" - more commonly known as New York and Illinois contract law - to determine the meaning of all arbitration agreements.
[*2269]

IV. Step-by-Step Solution

The current confusion in the lower courts notwithstanding, the Supreme Court's FAA cases have produced consistent principles that reveal a clear, administrable path through the choice-of-law problem. These principles preserve the role of state law - both in interpreting contracts and in conducting arbitration - without undermining (or threatening to undermine) the pro-arbitration policy of the FAA.

First, if the contract is clear on its face, then the parties' intent should govern. n110 As explained above, this premise

follows directly from the FAA's basic purpose - enforcing agreements according to their terms. Because the FAA does not favor arbitration under any particular set of rules, clear contracts suggest a clear resolution: the intent of the parties. n111

Second, if the contract is ambiguous, then courts should apply the relevant state law principles of contract construction. If, on the one hand, the state contract law points to the FAA, then those rules should apply. If, on the other, state contract law points to a state arbitration rule, then courts should engage in the Moses H. Cone preemption analysis: if the competing rule would inhibit arbitration, then the FAA applies; if the rule would comport with the FAA's pro-arbitration policy, then that rule, and not the FAA, applies.

This method offers several benefits. First, it preserves the traditional role of state contract principles (and all the concomitant benefits that those principles produce). Second, looking to those principles before engaging in the Moses H. Cone preemption analysis may allow courts to avoid the often difficult question whether a state law "undermines" the FAA's pro-arbitration policy. n112 Third, in accordance [*2270] with the Court's FAA preemption doctrine, careful analysis of a competing state arbitration law gives those states a chance to develop more efficient and practical rules to govern arbitration, again preserving their separate role in the federal system. n113

V. Conclusion

Lower courts are currently divided on both the meaning of generic choice-of-law clauses and how to deal with them. Their decisions highlight the recurring confusion created in the wake of the Court's decisions in Volt and Mastrobuono

and include the following analytical errors: applying FAA preemption without first analyzing whether the relevant state law would undermine the goals of the FAA; failing to recognize the proper role of state contract law in determining party intent; reading into Mastrobuono a general federal common law of contract construction; limiting the holding of Volt to state courts and the holding of Mastrobuono to federal courts, despite the forum-shopping that this result would generate; and ignoring the important limits that Congress placed, and that the Supreme Court has respected, on the FAA's reach into the realm of traditional state activity.

This is not to say that some of these lower court decisions are without sense: they create easy, administrable rules; parties can contract around them; and they reduce the frequency of litigation by providing clear notice of the likely result. Indeed, these rules may be more efficient than Congress's rules under the FAA.

Efficiency alone, however, is an insufficient justification for further extension under the current FAA into areas traditionally occupied by the states. n114 Indeed, the Court has explicitly rejected the notion that "efficiency" justifies altering the scope of the FAA: "The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." n115

[*2271] In misinterpreting Moses H. Cone to apply whenever ambiguity exists, courts have expanded the scope of FAA preemption. Indeed, a blanket pro-FAA default rule is more than a rule of contract construction - its effects make it a rule of preemption, as it displaces both state contract and

substantive law that would otherwise apply. The statute offers no support for such a reading, and its very text belies any notion that Congress meant to displace pro-arbitration state law. n116

The point here is not that Congress could not expand the scope of FAA preemption and adopt the very rules found in the circuit court decisions - indeed, perhaps it should. But the FAA's current scope limits the ability of lower courts to reshape state contract principles and to require courts (including state courts) to abandon an area traditionally within their power. If such an incursion on state law is to occur, it should come from Congress, not the courts. n117 And even if Congress meant for the FAA to apply in state and federal courts, Congress clearly did not intend for the Act to displace state law that is consistent with the FAA; Congress did not intend "to create such a sweeping body of federal substantive law completely to take away from the States their power to interpret contracts made by their own citizens in their own territory." n118 The answer, it seems, is to preserve the federalism line, respect the area that Congress left to the states, and wait for the proper body - the legislative arm of government - to adopt a more efficient statute if one is needed. Until then, lower courts should not make an unnecessary choice of federal law; instead they should stick to the doctrinal framework the Supreme Court has developed for the choice-of-law problem.

FOOTNOTES:

n1. Pub. L. No. 401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. 1-15 (2000)).

n2. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) (citing Volt Information Sciences, Inc. v. Board of

Trustees of Leland Stanford Junior University, 489 U.S. 468, 474 (1989)); see also H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1-2 (1924) ("The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. ").

n3. EEOC v. Waffle House, Inc., 122 S. Ct. 754, 764 (2002). A corollary requirement is that states, through legislation, not "single out arbitration provisions for suspect status." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

n4. See, e.g., First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) ("[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) ("The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.").

n5. See Volt, 489 U.S. at 476 ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.").

n6. See, e.g., Mitsubishi, 473 U.S. at 625 ("The "liberal federal policy favoring arbitration agreements,' manifested by [9 U.S.C. 2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal

substantive law establishing and regulating the duty to honor an agreement to arbitrate.'" (quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 25 n.32 (1983)) (citation omitted)).

n7. See, e.g., Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) (noting that "choice-of-law clauses are ubiquitous in commercial agreements").

n8. 489 U.S. 468 (1989).

n9. Id. at 474-79.

n10. 514 U.S. 52 (1995).

n11. Id. at 62-64.

n12. See infra Part III, pp. 2260-68.

n13. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 271-72 (1995).

n14. See id. at 268.

n15. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

n16. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction ... .").

n17. Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 339.

n18. See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) ("We have previously held that the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties.").

n19. See, e.g., Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685 (1996) ("State law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." (alteration in original) (emphasis omitted) (quoting Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987)) (internal quotation marks omitted)); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts." (emphasis added)); id. ("The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration." (citing Illinois and Pennsylvania case law)); Allied-Bruce, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles ... .").

n20. Whether the Court is fashioning a federal common law rule that merely "borrows" state contract law, or whether that law applies of its own force, seems irrelevant. In either case, the Court applies state contract principles, rather than a body of "federal common law rules of contract interpretation" wholly detached from the laws of those states connected to the dispute.

n21. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967).

n22. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) (emphasis added) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

n23. 517 U.S. 681 (1996).

n24. Mont. Code Ann. 27-5-114(4) (1995).

n25. Doctor's Assocs., 517 U.S. at 683 (quoting 9 U.S.C. 2 (2000)).

n26. 460 U.S. 1 (1983).

n27. Id. at 24.

n28. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

n29. Cf. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) ("Given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter." (citation omitted)).

n30. See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989). Moreover, in declaring the FAA's "healthy regard for the federal policy favoring arbitration," the Moses H. Cone Court notably did not suggest that this policy favored arbitration under the specific procedures set forth in the FAA. See Moses H. Cone, 460 U.S. at 24 (emphasis added).

n31. See infra section II.C, pp. 2256-60.

n32. Volt, 489 U.S. at 476.

n33. Id. at 476 n.5.

n34. The Court's language in Doctor's Associates further supports this view. In that case, the law held preempted invalidated arbitration clauses, but no others. In doing so, the state law struck at the heart of the FAA's purpose: ensuring the enforceability of arbitration agreements. The Court's analysis focused on this negative treatment, rather than the mere fact that the state had enacted rules to govern arbitration agreements generally. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("Courts may not ... invalidate arbitration agreements under state laws applicable only to arbitration provisions." (first emphasis added)); id. ("By enacting 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status." (emphasis added)); id. at 688 ("The "goals and policies' of the FAA, this Court's precedent indicates, are antithetical to threshold limitations placed specifically and solely on arbitration provisions." (emphasis added)); id. (noting that the state law "singularly limits" the validity of arbitration agreements (emphasis added)).

n35. EEOC v. Waffle House, Inc., 122 S. Ct. 754, 762 (2002); see also id. at 764 n.9 (noting that, absent contractual ambiguity, "Volt and Mastrobuono both direct courts to respect the terms of the agreement without regard to the federal policy favoring arbitration" (emphasis added)).

n36. These caveats, of course, do not undercut the FAA's preemption of state statutes, as in Doctor's Associates, that apply of their own force against the parties' will.

n37. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983) (internal quotation marks omitted)).

n38. See Volt, 489 U.S. at 477 ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.").

n39. Cf. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("Indeed, we have held that ""where ... the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest."'" (quoting English v. General Electric Co., 496 U.S. 72, 79 (1990) (alteration in original) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))).

Some members of the Court have stressed that preemption, especially in areas traditionally left to the states, should be used sparingly. Although Congress can undoubtedly set rules to govern contracts that, as here, fall within its commerce power, federal contract rules would force state courts to "rewrite" their contract rules (that is, to apply "federal" rules) for those agreements falling within the FAA's scope. Such effects suggest caution "in construing the act lest we excessiveiy encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states." Allied-Bruce, 513 U.S. at 280 (quoting, yet downplaying, Metro Industrial Painting Corp. v. Terminal Construction Co., 287 F.2d 382, 386 (2d Cir. 1961) (Lumbard, C.J., concurring) (internal quotation marks omitted)).

n40. See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-64 (1995).

n41. See, e.g., Volt, 489 U.S. at 474.

n42. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (noting the "liberal federal policy favoring arbitration agreements" (quoting Moses H. Cone, 460 U.S. at 24) (internal quotation marks omitted)).

n43. See Volt, 489 U.S. at 470-72.

n44. See id. at 471 n.3 (citing Cal. Civ. Proc. Code 1281.2(c) (West 1982)).

n45. Id. at 470.

n46. Id. at 474.

n47. Id. at 475 (alteration in original) (quoting 9 U.S.C. 4 (2000) (internal quotation marks omitted)).

n48. See id. at 474-75.

n49. Id. at 475.

n50. Id. at 476 n.5.

n51. Id. at 476.

n52. Id.

n53. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

n54. Volt, 489 U.S. at 476-77.

n55. See id. at 478.

n56. Id. at 478-79; see also id. at 479 (noting that the FAA does not prevent "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself").

n57. Id. at 476. Some may argue that Volt only applied the California state arbitration rule because the lower court found that the parties had actually intended to incorporate it into their agreement. On this reading, Volt said nothing about the scope of FAA preemption, as parties can affirmatively choose "to arbitrate under different rules than those set forth in the Act itself." Id. at 479. Such an interpretation, however, fails to explain the Court's discussion of the Moses H. Cone principle. In that discussion, the Court rejected the preemption argument precisely because the FAA did not disfavor (and thus did not preempt) state arbitration rules "manifestly designed to encourage resort to the arbitral process." Id. at 476. Thus, the better reading is that Volt found, first, that the parties' actual intent controls (even if those parties chose rules in which "arbitration is stayed where the Act would otherwise permit it to go forward," id. at 479), and second, that even if ambiguity exists, "the rule of liberal construction set forth in Moses H. Cone" does not require courts to apply the FAA when the competing state rule is consistent with "the federal policy favoring arbitration," id. at 476 n.5.

n58. 514 U.S. 52 (1995).

n59. See id. at 55 (citing Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976)).

n60. Id. at 62.

n61. Id. (quoting Volt, 489 U.S. at 476) (internal quotation marks omitted).

n62. Id.

n63. Id. at 62-64.

n64. See id. at 62 n.9 (explaining that the Court chose Illinois and New York law because of those states' connections to the contract and the choice-of-law clause, respectively, and because "the parties suggested no other State's law as arguably relevant to this controversy").

n65. Id. at 64. Although the Court did not rest its holding specifically on either prong of its analysis - the Moses H. Cone presumption in favor of arbitrability or the application of state contract principles - the Court recently cited only the "preemption" section of the opinion to explain Mastrobuono's holding. See EEOC v. Waffle House, Inc., 122 S. Ct. 754, 764 n.9 (2002).

n66. Id. at 64 (Thomas, J., dissenting) (arguing that "the choice-of-law provision here cannot reasonably be distinguished from the one in Volt").

n67. See Mastrobuono, 514 U.S. at 60 n.4 ("The dissent makes much of the similarity between this choice-of-law clause and the one in Volt[] ... . In Volt, however, we did not interpret the contract de novo ... . In the present case, by contrast, we review a federal court's interpretation of this contract, and our interpretation accords with that of the only decisionmaker arguably entitled to deference - the arbitrator." (citations and parentheticals omitted)).

n68. Indeed, like Mastrobuono, Volt did examine the Moses H. Cone principle - the federal law component of the contract analysis - independently of the state court's interpretation. See Volt, 489 U.S. at 475-76 & n.5.

n69. See id. at 476 & n.5.

n70. See Mastrobuono, 514 U.S. at 62. Nor does it make sense to limit Volt to state procedural rules (allowing them) and Mastrobuono to state substantive rules (rejecting them). See, e.g., Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 304-05 (3d Cir. 2001) (Ambro, J., concurring); Thomas A. Diamond, Choice of Law Clauses and Their Preemptive Effect on the Federal Arbitration Act: Reconciling the Supreme Court with Itself, 39 Ariz. L. Rev. 35, 61 (1997). This suggestion is a non-starter: the FAA declares "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone, 460 U.S. at 24. Quite simply, the FAA rejects state attempts - whatever their form - that limit arbitration.

n71. 136 F.3d 380 (4th Cir. 1998) (Luttig, J.).

n72. Id. at 382 (citing Mastrobuono).

n73. Id. at 383.

n74. UHC Mgmt. Co., Inc. v. Computer Scis. Corp., 148 F.3d 992, 997 (8th Cir. 1998).

n75. See Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1213 (9th Cir. 1998) (O'Scannlain, J.) (claiming to be "bound by Mastrobuono" and reasoning that, "because Mastrobuono dictates that general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators, the district court erred in applying [Cal. Civ. Proc. Code 1281.2(c) (West 1982)] to deny Foodmaker's motion to compel arbitration" (emphasis

added)); see also, e.g., Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129, 133-35 (2d Cir. 1996) (same).

n76. See Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 288-90 (3d Cir. 2001) (Becker, C.J.).

n77. Compare section II.A, above pp. 2252-53.

n78. Compare section II.B, above pp. 2253-56.

n79. Compare, e.g., First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (explaining that "courts generally ... should apply ordinary state-law principles that govern the formation of contracts"), and Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (noting that "the interpretation of private contracts is ordinarily a question of state law").

n80. Cf. Volt, 489 U.S. at 476 ("Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration - rules which are manifestly designed to encourage resort to the arbitral process - simply does not offend the rule of liberal construction set forth in Moses H. Cone, nor does it offend any other policy embodied in the FAA.").

n81. Precisely because state law should only be displaced when it would undermine the policies of the FAA, any default rule that categorically excludes state laws without determining whether those laws undermine the federal policy favoring arbitration risks displacing, without benefit or reason, acceptable state law.

n82. Compare, e.g., Volt, 489 U.S. at 476 (explaining that the FAA did not preempt Cal. Civ. Proc. Code 1281.2(c) (West 1982)), with Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1213 (9th Cir. 1998) (O' Scannlain, J.) (claiming

that the FAA, per Mastrobuono, precluded federal courts from applying, Cal. Civ. Proc. Code 1281.2(c)). Indeed, any of these courts' pro-FAA default rules would similarly "preempt" the state statue upheld in Volt.

n83. Federalism principles require that state law not be displaced absent a clear federal interest or Congressional intent. See infra note 88.

n84. See Volt, 489 U.S. at 476.

n85. Cf. id. at 476 n.5 (noting that "California has taken the lead in fashioning a legislative response to this problem"); Southland Corp. v. Keating, 465 U.S. 1, 19 (1984) (Stevens, J., concurring in part and dissenting in part) ("The existence of a federal statute enunciating a substantive federal policy does not necessarily require the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of their citizens."); id. at 33 (O'Connor, J., dissenting) (noting that states may choose from any number of state procedures that "vindicate 2 rights in a manner fully consonant with the language and background of that provision").

n86. See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 & n.10 (1995) (explaining how the contract rule in that case produces a fair and reasonable resolution to contractual ambiguity).

n87. See, e.g., Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685-88 (1996) (explaining that FAA preemption leaves in place state contract law that treats arbitration agreements the same as all other contracts).

n88. See, e.g., Southland Corp., 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) ("The exercise of state authority in a field traditionally occupied by state law will not be deemed pre-empted by a federal statute unless that was the clear and manifest purpose of Congress ... . Moreover, even where a federal statute does displace state authority, it "rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states ... . Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose.'" (quoting Paul M. Bator, Paul J. Mishkin, David L. Shapiro, & Herbert Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 470-71 (2d ed. 1973)) (citation omitted) (emphases added)). Although the scope of federal legislation may be greater today than it was in 1984, the logic remains that traditional state law should not be displaced absent a clear federal purpose.

n89. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983).

n90. See, e.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 271-72 (1995).

n91. Cf. id. at 284-85 (Scalia, J., dissenting) (arguing against applying the FAA in state court proceedings).

n92. See Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 289 (3d Cir. 2001) (noting that the rule would "be comparatively simple for arbitrators and district courts" to apply (emphasis added)). If Chief Judge Becker intended the rule to apply in both state and federal courts, the choice of the

term "district courts" (rather than "trial courts" or "federal and state courts") certainly left the matter ambiguous.

n93. See Southland, 465 U.S. at 15 ("The interpretation given to the Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping. We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted."); Moses H. Cone, 460 U.S. at 26 n.34 ("Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court.").

n94. Indeed, if those courts were anchoring their rule to Moses H. Cone, then they would have to apply it across the board as a new substantive rule of law - a result that would displace state law consistent with the Act and functionally overturn Volt (which, after all, upheld application of a state rule in an ambiguous contract).

n95. One could argue that the interest is in efficient judicial administration - essentially, setting up a default rule that is easy to apply and easy for parties to understand. Although possible, the Court disfavors rules (and especially judicially made rules) that displace state law in areas traditionally reserved to the states absent a clear, express indication that Congress intended such a displacement. No such indication exists here, nor do any of the circuits allege that one does.

n96. These circuits cannot rely on Mastrobuono to justify such a move. There, as explained above, the Court explicitly distinguished Volt and did not suggest that its reasoning was

unsound. Indeed, Mastrobuono itself applied the very same state contract principles and acknowledged the possibility of applying the type of state arbitral laws (were they consistent with the FAA) that the circuits' default rules categorically foreclose. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-64 & n.9 (1995).

n97. See supra section II.C, pp. 2256-60.

n98. Compare, e.g., Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 289 (3d Cir. 2001) (holding that "a generic choice-of-law clause ... is insufficient to support a finding that contracting parties intended to opt out of the FAA's default regime"), with Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 475-76 (1989) (asking whether applying the competing state policy would undermine the federal policy favoring arbitration).

n99. See supra section II.A, pp. 2252-53.

n100. See, e.g., Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130-31 (9th Cir. 2000) (applying Mastrobuono's contract analysis, based on New York and Illinois law, to a contract governed by New Jersey law); id. at 1131 ("In light of Mastrobuono and Wolsey, the district court correctly found that the federal law of arbitrability under the FAA governs the allocation of authority between courts and arbitrators."); Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1213 (9th Cir. 1998) (noting that Mastrobuono "dictated" the result (emphasis added)).

n101. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." (emphasis added)).

n102. Id.

n103. 304 U.S. 64 (1938); cf. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 424-25 (1967) (Black, J., dissenting) ("Yet under this Court's opinion today - that the Act supplies not only the remedy of enforcement but a body of federal doctrines to determine the validity of an arbitration agreement - failure to make the Act applicable in state courts would give rise to "forum shopping' and an unconstitutional discrimination that both Erie and Bernhardt [v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956)] were designed to eliminate.").

n104. 465 U.S. 1, 15-16 (1984).

n105. 513 U.S. 265, 272 (1995).

n106. See, e.g., Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 937-38 (6th Cir. 1998) (tracking the Mastrobuono "guideposts" with a contract referencing Ohio rather than New York or Illinois law).

n107. For this reason, circuits relying on Mastrobuono in applying those "guideposts" of contract interpretation are also misguided in thinking that Mastrobuono devised a separate set of federal common law principles of contract construction: the actual message of Mastrobuono was to look at the state law of contract interpretation, as the Court in that case did, and then to apply those state principles in the same way they would have been applied had the case been brought in state court. Had the parties in Mastrobuono contracted in a different state, the Court may have applied an entirely different set of principles. Put simply, any court that applies, without analysis, the state contract principles used in Mastrobuono is actually applying New York and Illinois contract law to

agreements that rarely have any connection to those two states.

n108. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-64 (1995).

n109. See id. at 62 n.9.

n110. See, e.g., EEOC v. Waffle House, Inc., 122 S. Ct. 754, 764 (2002) ("While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract ... ." (citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 476 (1989))).

n111. Of course, suggesting that the parties' intent governs does not mean that contracts that would otherwise be void or against public policy (for general reasons) must be enforced. See 9 U.S.C. 2 (2000). For example, courts would not be required to enforce agreements to arbitrate substantive rights that Congress has confined to judicial resolution. Cf., e.g., Wilko v. Swan, 346 U.S. 427 (1953). Parties also would not be able to provide that district judges review arbitration awards "by flipping a coin or studying the entrails of a dead fowl." Lapine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

n112. One might rely here on principles found in the doctrines of basic "constitutional avoidance," and perhaps abstention. Although constitutional avoidance has justifications inapplicable here - such as the presumption that Congress did not intend to exercise its powers to the fullest extent without so indicating - the present situation tracks constitutional

avoidance by allowing courts to evade difficult questions of law when the decision can rest on other grounds. Here, applying traditional principles of state contract law presents a less ambitious judicial exercise than comparing and perhaps rejecting state substantive law. In that way, applying state contract law, even if it points away from applying state substantive law, furthers comity and judicial efficiency.

n113. The FAA, reaching to the extent of Congress's commerce power, covers many, if not most, employment contracts. Preserving the role of state law in the face of contractual ambiguity thus increases the incentive for states to experiment with better and more efficient arbitration rules and procedures, while (using the functional check found in Moses H. Cone) ensuring that contractual ambiguity will not be used to limit the otherwise broad scope of arbitration agreements.

n114. Cf. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 284 (1995) (O'Connor, J., concurring) (noting that it was up to Congress to correct Southland Corp. v. Keating, 465 U.S. 1, 16 (1984), which held that the FAA is applicable in state as well as federal courts, "if it wishes to preserve state autonomy in state courts").

n115. Dean Witter Reynolds Inc., v. Byrd, 470 U.S. 213, 219 (1985).

n116. See Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) ("In instances such as these, the text of 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute ... . State law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.").

n117. Cf. Allied-Bruce, 513 U.S. at 283 (O'Connor, J., concurring) ("I have no doubt that Congress could enact, in the first instance, a federal arbitration statute that displaces most state arbitration laws. But I also have no doubt that, in 1925, Congress enacted no such statute."); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 425 (1967) (Black, J., dissenting) ("I am completely unable to agree to this new version of the Arbitration Act, a version which its own creator ... practically admitted was judicial legislation. Congress might possibly have enacted such a version into law had it been able to foresee subsequent legal events, but I do not think this Court should do so.").

n118. Prima Paint, 388 U.S. at 422 (Black, J., dissenting); see also Allied-Bruce, 513 U.S. at 292 (Thomas, J., dissenting) ("Even if the interstate commerce requirement raises uncertainty about the original meaning of the statute, we should resolve the uncertainty in light of core principles of federalism .... To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather, we must be "absolutely certain' that Congress intended such dis-placement before we give preemptive effect to a federal statute." (quoting Gregory v. Ashcroft, 501 U.S. 452, 464 (1991))).

Supreme Court, U.S.
FILED
OCT 27 2005
OFFICE OF THE CLERK

No. 05-261

IN THE

Supreme Court of the United States

JACADA (Europe), LTD.,
f/k/a Client/Server Technology (Europe), Ltd.,

Petitioner,

v.

INTERNATIONAL MARKETING STRATEGIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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ISSUES PRESENTED

1. Whether the arbitration award is "domestic" under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201, *et seq*.

2. Whether the standard of review established by the Federal Arbitration Act or the state standard for review of arbitral awards applies.

3. Whether the United States District Court for the Western District of Michigan manifestly disregarded the law when enforcing the arbitration award rendered in favor of Respondent.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondent, International Marketing Strategies, Inc., is now a wholly owned subsidiary of Vacava, L.L.C. but Vacava, L.L.C. is not a publicly held corporation.

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Appendix B — Order Of The State Of Michigan In The Circuit Court For The County Of Oakland Denying Motion For Summary Disposition Dated December 11, 2001 ..... 3a

OPINIONS AND ORDERS BELOW

The Award of the Arbitrators was rendered on April 3, 2001 (Petitioner's Appendix at 66a)[1]. The proceedings ultimately before the United States District Court for the Western District of Michigan were a result of the consolidation of one action originally commenced in that court by Respondent to enforce the arbitration award, and one commenced in the Oakland County Circuit Court by Petitioners in an effort to have the arbitration award set aside. The opinions and decisions below are as follows:

1. Memorandum Opinion and Order of *August 13, 2001*, regarding the District Court's preliminary jurisdictional determination and staying proceedings (R. 13, JA 78).
2. Memorandum Opinion and Order of *August 31, 2001*, clarifying and qualifying the August 18, 2001 Memorandum Opinion and Order (R. 16, JA 81).
3. Judge Denise Langford-Morris of the Oakland County Circuit Court rendered a decision on *December 11, 2001* denying IMS' Motion for Summary Disposition and holding that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") does apply, permitting Petitioner to remove the state court action to federal court (**Resp. App. A**, including decision and transcript, R. 16, JA 81 and R. 33, JA 162).
4. On *July 1, 2002*, Judge Robert Holmes Bell entered an Order to Consolidate and Lift Stay (R. 20, JA 87).
5. On *March 31, 2002*, Judge Bell entered an Opinion and Order regarding the application of the Convention

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1. References to Petitioner's appendix to the Petition for Writ of Certiorari will hereinafter be referred to as "Pet. App." Citations to the District Court record will be cited as "R.__" and citations to the Circuit Court Record Joint Appendix will be cited as "JA__". In the event Respondent cites to documents not attached to Petitioner's Petition for Writ of Certiorari, Respondent will cite as "Resp. App."

and the applicable standard of review (Pet. App. at 35a, R. 36, JA 27), reported at 255 F. Supp. 2d 744 (W.D. Mich. 2003).

6. Judge Bell entered an Opinion and Order on *October 22, 2003*, enforcing the Arbitration Award in favor of Respondent (Pet. App. at 49a, R. 59, JA 40), unreported.

7. The United States Court of Appeals for the Sixth Circuit rendered a decision upholding the District Court's enforcement on *March 18, 2005*, which decision is published at 401 F.3d 701 (6th Cir. 2005) (Pet. App. at 3a). Rehearing was denied in an unpublished decision entered on *May 27, 2005* (Pet. App. at 1a).

RELEVANT STATUTES AND TREATIES

IMS accepts the statement of relevant statutes and treaties offered by Petitioner but further provides the Court with Section 10 of the FAA, which establishes the standard for the vacation of an arbitration award as follows:

> **(a)** In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> > **(1)** where the award was procured by corruption, fraud, or undue means;
> >
> > **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;
> >
> > **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10.

STATEMENT OF THE CASE

On or about May 2, 1997, IMS and CST (later renamed Jacada but referred to herein as "CST") entered into a Distribution Agreement (hereinafter, "Agreement") (R. 28, JA 96). Pursuant to that Agreement, IMS was given the exclusive right to market and distribute the Jacada/400 product in the Territory defined **as Europe, the Middle East, and Africa** (not the United States). IMS spent over one year marketing the Jacada and Jacada Gold products to a company called JBA International, Inc. ("JBA"), a European company (now GEAC). On February 27, 1999, JBA purchased the Jacada and Jacada Gold products for approximately $7,000,000. In addition to purchasing the Jacada and Jacada Gold products, JBA also purchased the right to re-sell those products, contrary to IMS' exclusive distribution rights under the Agreement. IMS's efforts were fruitful yet CST refused to compensate IMS under the Agreement.

IMS initiated arbitration proceedings in Michigan pursuant to the Agreement (R. 28, JA 96). In November of 2000, the parties participated in a week long arbitration proceeding before a panel of three attorneys who specialize in technology related legal issues. During the hearing, IMS presented six witnesses – five personally present and the sixth testified telephonically from Kuala Lumpur. CST presented one live witness and one telephonically from England. The parties submitted a total of approximately 237 exhibits. The parties had taken depositions in England (2) and in Atlanta, Georgia.

The arbitration panel issued its award on April 3, 2001, which was favorable to IMS (Pet. App. at 66a, R. 45, JA 91). As part of the award, the panel determined as follows:

a. IMS was the procuring cause of the sale of the Jacada product to JBA (R. 28, Arbitration Award, p. 2; JA 92).

b. 50% of the license fee paid by a customer would go to CST and 50% to IMS (R. 28, Arbitration Award, p. 3; JA 93).

c. The limitation of damages clause is unreasonable, unconscionable, and fails of its essential purpose (R. 28, Arbitration Award, p. 3; JA 93).

The arbitrators awarded IMS an initial payment from CST of $401,299 to be paid within 30 days of the date of the award, which was 50% of the payments that CST had already received from JBA, less $1,110,000 in expenses incurred by CST during due diligence. IMS was further awarded 50% of nine remaining payments from JBA to CST in the amount of 208,333 pounds sterling for each payment through February 1, 2003 (R. 28, Ex. 13, Arbitration Award, p 4, JA 94).

On April 24, 2001, IMS moved to enforce the arbitration award in the United States District Court for the Western District of Michigan and CST sought to have the award vacated in an action in the Oakland County Circuit Court. In addition to asserting federal district court jurisdiction premised on Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 203 and the Convention, IMS' Application expressly includes statements that IMS is an entity organized under the laws of the State of Michigan and CST is an English company. Further, that Application seeks enforcement of an arbitration award amounting to approximately 25 times the federal court's jurisdictional limit.

On November 28, 2001, the Oakland County Circuit Court held that the award was non-domestic and the Convention applied. IMS then had the state court action transferred to

Kalamazoo, Michigan (R. 28, paragraph 11(g), JA 103), then removed to the United States District Court for the Western District of Michigan pursuant to 9 U.S.C. § 205. Once the state court action was removed, the United States District Court for the Western District of Michigan consolidated the two actions and lifted the stay of the proceeding that was originally imposed by the District Court.

The District Court entered an Order on March 31, 2003 establishing the applicable standard of review (R. 36, JA 27). The District Court confirmed that the arbitration award falls under the Convention as a non-domestic award, but also held that the standard of review applicable under Chapter 1 of the Federal Arbitration Act applied by virtue of Article V(1)(e) of the Convention. The district court's standard of review decision cited cases from five different federal circuits supporting the application of the Convention. Regarding CST's urging to disregard these cases, the district court stated as follows:

> Jacada contends that *Bergesen* was wrongly decided and should not be followed by this Court. Jacada's contention is *not supported by any case law* and does not provide a convincing basis for ignoring the opinions of *all* of the circuit courts that have considered the issue. (R. 36, Opinion dated March 31, 2002, p 8; JA 35). *Emphasis added.*

On October 22, 2003, the District Court rendered its decision regarding the enforceability of the arbitration award under the Convention and Chapter 1 of the Federal Arbitration Act, 9 U.S.C. § 101 *et seq.*, stating in relevant part as follows:

> The Court is satisfied that the arbitrators' award does in fact "draw its essence" from the contract. . . . Although the arbitrators' explicitly disregarded the limitation of damages provision, this is not a case where the arbitrators simply redrafted the Agreement according to their own sense of fairness. It is evident from a review of the arbitrators' award that they disregarded the limitation of damages provision in

order to give effect to IMS' exclusive distribution rights and duties under the Agreement. The arbitrators found that IMS was the procuring cause of the sale to JBA and that IMS would likely have completed the sale to JBA had CST not asked IMS to step aside. (Arb. Award at 2). That finding is not being challenged by CST. Had the arbitrators applied the limitation of damages provision to a breach of the exclusivity provision, IMS would receive no consideration for undertaking its contractual obligation . . . and it would have no remedy if CST jumped in at the last minute, as it did here, to take the contract from IMS.

There was also evidence in the record from which the Arbitrators could find that the limitation provision was intended to apply to failures of the Product to conform to its intended purpose, rather than to a breach of the exclusivity provision. (Roark-Peters testimony, Arb. Tr. Vo. I at 128-129). . . . CST introduced no contradictory evidence regarding the intent of the parties.

In ignoring the limitation of damages clause the arbitrators were clearly attempting to give effect to the essential terms of the contract and the intent of the parties. Accordingly, the Court is satisfied that their disregard of the limitation of damages provision drew its essence from the contract. (District Court' Opinion of October 21, 2003, pp 8-9).

On March 18, 2005, the United States Circuit Court for the Sixth Circuit rendered its decision confirming the application of the Convention and upholding the Award. **Not one of the judges of the Sixth Circuit disagreed with the application of the Convention.** Now, more than four years after the Award was rendered, and two separate courts have ruled to enforce the award, CST continues to fight its enforcement without legal authority or even a sound basis for an extension of the law.

REASONS FOR DENYING THE PETITION

Summary of the Argument

The issues raised by CST are not novel legal issues, nor are they issues regarding which the federal courts are split. The implicated Convention and statutory language have been consistently interpreted and applied across the circuits. CST's attempts to raise artificial concern about the purportedly expanding scope of federal jurisdiction is misplaced. This action involves foreign commerce and implicates this Country's adherence and commitment to an international treaty to which it has become a party.

The Award is not a domestic award but rather , involves foreign parties, a contract signed abroad, an exclusive distribution territory that was entirely outside of the United States, and a breach abroad. The Convention applies. The district court appropriately refused to apply the standard for the review of arbitral awards established by the state of Michigan. The state trial court confirmed the application of the Convention. The parties did not agree that Michigan's standard for the review of arbitral awards would apply, and the FAA preempts state law on this issue regardless.

The Arbitration Award was well grounded in fact and law. The panel of arbitrators, after a full and fair hearing on the matter, confirmed that IMS was entitled to recover damages for the breach that CST does not dispute. Reading the Agreement as a whole, and giving affect to the intent of the parties as established during the arbitral proceedings, IMS is entitled to collect its benefit of the bargain under the Agreement.

I. The Circuit Court Appropriately Established Subject Matter Jurisdiction

CST would like this Court to deny federal subject matter jurisdiction in the enforcement of an arbitration award rendered between a U.S. company and a British company regarding an Agreement entered into in Great Britain, with a distribution

territory of Europe, Africa and the Middle East, which was breached in Europe by CST's failure to pay for IMS' sale of the CST product to another British company, JBA. Regardless of the application of the Convention however, the District Court had subject matter jurisdiction under 28 U.S.C. § 1332 (diversity jurisdiction).

The legislative history, the language of the Convention, the language of the implementing legislation, and every single federal appellate court decision addressing the issue raised by Petitioner support the finding of the Michigan trial court, the District Court and the Court of Appeals. The parties' contract and this dispute involved "foreign commerce." The language of the Award CST relies upon to suggest the arbitrators determined the Award was not domestic merely established venue under the Convention, it did not address domesticity or whether the Convention applies. To the contrary, its inclusion in the Arbitration Award is indicative of the arbitrators' perception that the Convention was applicable.

All of the following facts support the decisions below:

(a) The Distribution Agreement was between CST, an English company, and IMS, a Michigan corporation.

(b) The Agreement was executed in Europe.

(c) The "Territory" under exclusive distribution rights of the Agreement was Europe, the Middle East, and Africa (not the United States).

(d) Performance under the Agreement took place abroad.

(e) The breach took place abroad.

(f) The sale that led to this dispute was to a European company, JBA.

A. Convention Language and Precedent

The language of the Convention, the language of the implementing legislation, 9 U.S.C. § 201 *et seq.*, and all of the federal circuit courts that have rendered a decision on the application of the Convention support only one conclusion, that the Convention applies to this action.

Citing *Bergesen v Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983), Judge Bell stated as follows:

> . . . the second sentence of Article I(1), as supplemented by 9 U.S.C. § 202, applies to those arbitral awards made in the United States which arise from a commercial relationship with some significant foreign nexus. *Coutinho Caro*, 2000 U.S. Dist. LEXIS 8498, 2000 WL 435566 at *4.

Bergesen's broad interpretation of the scope of the Convention has been widely followed.

The relevant portions of Article I of the Convention read as follows:

> Section 1. This Convention shall apply to. . . . *It shall also apply to arbitral awards not considered domestic awards in the State where their recognition and enforcement are sought.* Emphasis added.
>
> Section 3. When signing, ratifying or acceding to this Convention . . . *any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.* It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Consequently, Section 3 of Article I of the Convention permits signatory states, such as the United States, to implement their

own declaration on two issues of potentially limiting the application of the Convention: (1) that it will only apply if the award is rendered in another state; and/or (2) it will only apply to legal relationships that are commercial under U.S. law.

The Legislature's decision on these two issues is reflected in the U.S. implementing legislation of the Convention found in Chapter 2 of the FAA (9 U.S.C. § 201 *et seq.*). That language is clear, indisputable, and dispositive of this action. The Legislature chose NOT to implement the first limitation but to implement the second limitation proposed by Section 3 Article I of the Convention.

Specifically, 9 U.S.C. § 202 provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, *which is considered as commercial*, . . . , falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless *that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states*. (Emphasis added).

As is obvious from the express language of Section 202 of Title 9, the Legislature chose to enact the limitation that the relationship be commercial. It chose NOT to enact the limitation that the arbitration award not be rendered in the United States in order to fall under the Convention. CST's argument is directly contradicted by the actions of the Legislature in implementing the Convention.

CST also suggests that the language of 9 U.S.C. § 202 that reads:

> the relationship involves property located abroad, envisages performance or enforcement abroad, or

> has some other reasonable relation with one or more foreign states

applies only to actions where both parties are U.S. citizens. Such an interpretation defies logic and is a strained extrapolation of the language of § 202. An award is not *less* domestic because both of the parties are U.S. citizens.

CST cites to the legislative commentary purporting to acknowledge the continued application of Chapter 1 of the FAA to "interstate commerce" (Appellant's Proof Brief, p 22-23). It cannot be disputed that the Agreement here did not involve local or even interstate commerce. Rather, it involved commerce in three geographical regions, Europe, the Middle East and Africa. This is foreign commerce. CST's citation of Mr. Kearny's commentary only supports IMS' position. Mr. Kearny stated, "the implementation of the Convention should be concerned only with **foreign commerce**" (emphasis added).

The United States Supreme Court acknowledged the purpose of this country's adoption of the Convention to "encourage recognition and enforcement of commercial arbitration agreements in *international contracts* and to unify standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries.[2] The Agreement under scrutiny in this action can only be considered an 'international contract'. Every federal circuit court that has addressed the issue of the interpretation of "domestic" under Chapter 2 of the FAA has supported the application of the Convention in this instance. This case does not warrant *certiorari*.

First, in 1982, the United States Circuit Court for the First Circuit rendered its decision in *Ledee v Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982). The First Circuit set forth a test, as

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2. *Scherk v Alberto-Culver Co.*, 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974), *reh den.*, 419 U.S. 885 (emphasis added).

follows, to determine whether an award falls under the Convention:

(1) Is there an agreement in writing to arbitrate the subject of the dispute? Convention, Articles (II)(1), II(2).

(2) Does the agreement provide for arbitration in the territory of a signatory of the Convention? Convention, Article I(1), I(3); 9 U.S.C. § 206; *additional citations omitted.*

(3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? Convention, Article I(3); 9 U.S.C. § 202.

(4) Is a party to the agreement not an American citizen, *or* does the commercial relationship have some reasonable relation with one or more foreign states?[3]

If the answer is yes to each of these questions, the dispute falls under the Convention. In the present action, the answer to all of the above is YES. In *Ledee, supra*, the defendant was a citizen of Italy that made and marketed ceramic tiles. The plaintiffs were Puerto Rican citizens. The action was brought in the United States District Court for the District of Puerto Rico. The parties had entered into a distributorship agreement whereby the plaintiff would be the exclusive distributor of the defendant's ceramic tiles in the Antilles. Consequently, like in the present action, one of the parties was local and one of the parties was foreign. The contract between the parties envisaged performance abroad. The 1st Circuit in *Ledee*, determined that the action was not domestic and therefore, was governed by the Convention.

The 2nd Circuit addressed the application of the Convention in 1983 in the case of *Bergesen v Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983). The court stated:

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3. 9 U.S.C. § 202. *Ledee, supra* at 186-87.

> The Convention did not define nondomestic awards. The definition appears to have been left out deliberately in order to cover as wide a variety of enforcing authority to supply its own definition of "nondomestic" in conformity with its own national law.

Id. at 932. *Bergesen* involved an arbitration award rendered in the United States between two foreign entities. The Second Circuit expressly emphasized the narrow interpretation of the term 'domestic' such that the international nature of a contract will assure the enforcement of any applicable arbitration provision under the Convention. That court confirmed the non-domestic nature of the dispute and applied the Convention.

In 1989, the United States Circuit Court for the Ninth Circuit addressed the issue of the domesticity of an arbitration award in *Ministry of Defense of the Islamic Republic of Iran v Gould Inc.*, 887 F.2d 1357 (9th Cir. 1989). The Ninth Circuit held that the Convention applies when the arbitral award:

> (1) arises out of a legal relationship (2) which is commercial in nature and (3) which is not entirely domestic in scope", and that the award at issue was "obviously not domestic in nature because Iran [was] one of the parties to the agreement."

Id. at 1362.

In 1995, the Seventh Circuit similarly interpreted § 202 to include "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, . . ." *Jain v de Mere*, 51 F.3d 686, 689 (7th Cir.), *cert. den.*, 116 S. Ct. 300 (1995). *Jain, supra*, involved a commercial dispute between two foreign entities. While in the present action IMS is not a foreign entity, the division of IMS with which CST dealt under the Agreement was IMS-Europe. CST is a European company founded in Israel.

The Agreement clearly contemplated and involved an international relationship and business conducted in foreign commerce.

Next, in 1995, the United States District Court for the Eleventh District rendered its decision in *Industrial Risk v M.A.N.*, 141 F.3d 1434 (11th Cir. 1998), holding that an arbitral award issued by an arbitral panel sitting in the United States and applying American federal or state law *still* may fall under the Convention. The court stated:

> The purpose of the New York Convention, and of the United States' accession to the convention, is to 'encourage the recognition and enforcement of international arbitral awards,' *Bergensen* at 932, to 'relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation.'[4]
>
> . . . an arbitral award made in the United States, under American law, falls within the purview of the New York Convention– and is thus governed by Chapter 2 of the FAA– when one of the parties to the arbitration is domiciled or has its principal place of business outside the United States.

Id. at 1441.

In *Lander Company, Inc. v MMP Investments, Inc.*, 107 F.3d 476 (7th Cir. 1997), the Seventh Circuit considered the applicability of the Convention where the commercial contract involved two U.S. companies. The contract called for the distribution *abroad* by MMP Investments, Inc. of shampoo and other products manufactured by Lander in the United States. The Seventh Circuit held that simply because an award was rendered in the United States does not make that award 'domestic', even if both parties are American companies. Where

4. *Ultracashmere House, Ltd. v Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981). *Industrial Risk, supra* at 1440.

both companies were American but the contract called for distribution abroad, the Seventh Circuit held that the arbitration award fell under the Convention and Chapter 2 of the FAA. In *Lander*, the award was rendered in the United States, the product was produced in the United States, AND both parties were American companies. *Nevertheless, the award still fell under the Convention as the performance of the contract was to take place abroad.* It involved "foreign commerce".

All of the appellate court decisions interpreting the application of the Convention in the context of an allegedly "domestic" award, as well as the language of the Convention and 9 U.S.C. § 202, the state court, the District Court, and the Circuit Court's, determinations that the present action falls under the Convention were correct. *Certiorari* in this action is unsupported.

In support of its position, CST cites the Restatement (Second) of Conflicts of Law § 220, comment c (1971). The court in *Lander*, *supra*, expressly rejected the narrow interpretation of the language in the Restatement and decided instead to rely upon the broad and encompassing language of Section 202 of the Federal Arbitration Act to provide a more appropriate definition of 'domestic' awards. The United States and Congress have a clear interest in preserving the relationship of the U.S. with the other signatory countries. The states, on the other hand, do not have a similar interest. Because CST is the foreign party and it is CST asking the Court to disregard the application of the Convention, it may seem less offensive to disregard the interests of the United States and the federal courts in enforcing this international arbitral award. Imagine the offense to U.S. relationships in foreign commerce were the U.S. to refuse to apply the Convention where a foreign party sought enforcement, simply because the arbitral award was rendered in the United States and applied the laws of one of its states.[5]

5. Sweden, a country that is frequently chosen as a neutral site for international arbitration, were it to adopt the holding CST advocates, would seldom enforce an arbitration agreement under the Convention.

CST also argues that some of the federal circuit court cases cited above are not instructive because they involved actions to compel arbitration under the Convention as opposed to actions under the Convention to enforce an arbitration award already rendered, as is the case in the present action.[6] Neither the Convention language nor Chapter 2 of the FAA provides a different definition for what agreements fall under the Convention for actions to compel arbitration and actions to enforce an award. In fact, were we to accept CST's reasoning that the award is domestic because it was rendered in Michigan, a federal district court could exercise its jurisdiction under the Convention to compel arbitration but then refuse to exercise that same jurisdiction to enforce an award that was rendered.

CST urges the overruling of the holding in *Bergesen*, *supra*, suggesting that hard cases make bad law. Unfortunately for CST, the present action is not a "hard" case. This dispute clearly involves foreign commerce. Similarly, the 'hard case' theory is not persuasive in light of the numerous other federal circuits that have followed the line of reasoning in *Bergesen*. Each could have chosen to narrow the application of the Convention. Understanding the import and purpose behind the implementation of the Convention, each appropriately stood true to the Legislature's intention that it be broadly applied, which intention is evidenced by the language of Chapter 2 of the FAA. Looking to the commentary preceding the enactment of Chapter 2, the discussion is clear that agreements involving "foreign commerce" were to be governed by the Convention.

CST warns of some dangerous and ominous shift of power between the state and federal judicial systems. The brevity of attention CST gives this argument is indicative of its strength. Clearly the federal judicial system has much more of a stake in applying the Convention to an action that does not involve local

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6. While CST argues *Bergesen* is the only decision this Court must ignore or overrule in order to find in its favor, in fact, all of the circuit court decisions cited herein must be overruled in order to rule in CST's favor.

commerce but rather, foreign commerce in the form of an Agreement signed abroad, performed abroad (as contemplated), and breached abroad. It is ridiculous to claim the state of Michigan has a greater stake in this matter than the United States.

9 U.S.C. § 208 reads, "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States". Absolutely no *violence* has been done to the local law, particularly where the district court applied Article V, Section 1(e) to impose the standard of review found under Chapter 1 of the FAA, and particularly where the state court similarly held that the Convention applies.

B. Alternative Basis for Federal Subject Matter Jurisdiction

Even if the Convention does not apply, which it does, the District Court still had subject matter jurisdiction. CST's position that the action must be remanded because, if the Convention does not apply, the District Court did not have subject matter jurisdiction is not supported by the law CST cites.

The District Court did not rely only upon the removed action for subject matter jurisdiction. The original Application to Enforce Arbitration Award similarly established subject matter jurisdiction. The facts as pled, and conceded by CST, confirm that CST is not a Michigan citizen and the arbitration award in controversy is valued at $401,299.00 plus fifty percent of nine remaining payments of 208,333 pounds sterling. See paragraphs 1, 2 and 7 of the Application to Enforce the Arbitration Award. The facts alleged were sufficient to confer diversity jurisdiction in the district court. 29 U.S.C. § 1332.

II. The FAA Preempts State Law As To The Standard Of Review Of An International Arbitration Award

The district court's determination that the FAA preempts Michigan law is well supported by applicable law. The cases of *Roadway Package System, Inc. v Kayswer*, 257 F.3d 287 (2001) and *Action Industries, Inc. v Unites States Fidelity & Guarantee Corporation*, 358 F.3d 337 (2004), are two cases that address the same issue presented here. In those cases, the Third Circuit and Fifth Circuit both held that parties have the ability to contractually opt out of the standard of review established by the FAA but that a generic choice-of-law provision is insufficient to support a finding that contracting parties actually intended to opt out of the FAA's "default regime" of review. *Roadway Package System*, at 288-89. In the federal action, the court does not really even have to get to the question of preemption as the contract itself does not evidence an intent that Michigan law will apply as it relates to the standard of review of the arbitration award.

However, even if this Court were to look to the state court for guidance on the standard of review, the state court, on Petitioner's Complaint to Vacate the Arbitration Award, has specifically ruled that the Convention applies. Therefore, even if state law prevails, the state has chosen to apply the Convention, which review provisions are even narrower.

Another useful case on this issue is *Ferro Corporation v Garrison Industries, Inc.*, 142 F.3d 926 (6th Cir. 1998). In *Ferro*, the Sixth Circuit Court of Appeals reversed the decision of the district court,[7] determining that, despite the choice-of-law language, there was no indication that the parties intended to incorporate Ohio law regarding whether the issue of fraudulent inducement would be adjudicated in a judicial forum rather than

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7. The district court relied upon *Volt Information Sciences, Inc. v Board of Trustees of Leland Standford Junior Univ.*, 489 U.S. 468, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989) and *Public Service Credit Union v Ernest*, 988 F.2d 727 (6th Cir. 1989)

by the arbitrators. *Ferro Corporation, supra* at 937. Specifically, the Sixth Circuit inquired as to whether the application of state law under the circumstances would conflict with the application of federal law, as that was the fundamental inquiry in *Volt, supra*. *Ferro, supra* at 934-35. In addition, this Court in *Volt, supra*, did not interpret the contract itself but relied upon the interpretation given by the California court. *See Mastrobuono v Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 1217 n.4, 131 L. Ed. 2d 76 (1995). In *Mastrobuono, supra*, the Court was reviewing the contract interpretation given by a federal district court, as is the case in the present action. **In the present action, even were this Court of Appeals constrained by the contract interpretation of the state court, that interpretation would apply the Convention, not state law.** The Oakland County Circuit Court already ruled that the Convention applies. In *Doctor's Associates, Inc. v Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 901 (1996), *Volt, supra* was further limited when this Court applied the FAA to preempt a Montana statute imposing notice requirements on the enforceability of an arbitration agreement.

As stated in *Mastrobuono, supra*, "the choice-of-law provision covers the rights and duties of the parties . . ." *Mastrobuono, supra* at 1219. Therefore, for all of the following reasons, as to the standard of review, the FAA preempts the application of Michigan's standard of review of arbitration awards:

(a) The application of state law would conflict with the FAA because clearly each body of law imposes a different standard of review (see *Ferro, supra* at 934-935 and *Volt, supra* at 476 n.5);

(b) This Court is reviewing decisions of the federal district court's interpretation of the Agreement and the Oakland County Circuit Court's interpretation

of the Agreement, both of which held the Convention applies;[8]

(c) As acknowledged by the district court's decision, the choice-of-law provision is a broad provision that does not purport to limit or restrict the standard of review applied to the arbitration award but rather, is only intended to govern the rights and obligations of the parties under the Agreement. See *Mastrobuono, supra* at 1219; and

(d) Application of the Michigan standard of review would undermine the policies of the FAA by failing to give the appropriate level of deference to decisions rendered by duly authorized arbitration panels.

It is improper for CST to attempt to persuade this Court to hear a case as a result of alleged disparity among the circuits when the cases CST relies upon do not hold what CST represents they hold. CST relies upon the case of *Public Service Credit Union, supra*, however, that case is not instructive because the parties stipulated to the application of the state arbitration statute and the Sixth Circuit was not required to address the issue at all.[9] The Sixth Circuit Court stated, "[s]ince both parties agreed that the Michigan statute controlled their agreement, federal law was simply not applicable to this case." *Id.* CST's brief suggests that the state law provision rendered the FAA inapplicable. There was absolutely no such holding by the court. The only other two cases CST cites in this regard are *Ekstrom v Value Health, Inc.*, 68 F.3d 1391 (1995) and *ASW Allstate Painting & Construction Co., Inc. v Lexington Insurance Company*, 188 F.3d 307 (1999). These to cases provide no support for CST's position. Though both were decided after *Mastrobuono, supra*, neither circuit cited this Court's precedent in *Mastrobuono*,

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8. *See YusufAhmed Alghanim & Sons, W.L.L. v Toys "R" Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997).

9. *Public Service Credit Union, supra* at 629.

supra. Furthermore, in *ASW Allstate Painting & Construction Co., Inc., supra*, the Fifth Circuit held that the Texas law there in question did not conflict with the FAA. In the present action, there is no dispute that the standard of review under Michigan law would conflict with the standard established by the FAA.

It is clear, from the language of the FAA, that it applies to all agreements evidencing transactions involving commerce. 9 U.S.C. § 2. In *Appalachian Regional Healthcare Inc. v Beyt, Rish, Robbins Group, Architects*, Docket No. 91-6063, May 19, 1992 (6th Cir.), unpublished, the Sixth Circuit Court of Appeals similarly reviewed the continuing breadth of *Volt*, and its application to the question of whether the FAA applies regardless of the existence of a state choice-of-law provision. The Sixth Circuit confirmed that *Volt, supra* does not require disregard of the FAA simply because of the existence of a choice-of-law provision selecting state law. The court held:

> We find that the district court need not have addressed the abstention issue because under the Federal Arbitration Act, the arbitration award was subject to a limited scope of review and the only question before the district court was whether the arbitrators overstepped their authority in rendering the award.

Id. at 6-7.

The Sixth Circuit Court cited several federal decisions in support of its application of the FAA in the face of a state choice-of-law provision.[10] For all of these reasons, the district court's decision not to apply the Michigan standard of review for the enforcement of arbitration awards was supported by case law as well as the FAA.

Petitioner points to the choice-of-law provision selecting Michigan law to argue that the standard for reviewing arbitration

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10. *Todd Shipyards Corp. v Cunard Line, Ltd.*, 934 F.2d 1056, 1062 (9th Cir. 1991), *Painwebber Inc. v Hartmann*, 921 F.2d 507, 510 (3d Cir. 1990), *Ackerberg v Johnson*, 892 F.2d 1328, 1333-34 (8th Cir. 1989), additional citations omitted.

awards established under Michigan law should have been applied. However, standard choice of law provisions address horizontal choice of law, not vertical choice of law. In other words, the reason parties insert a choice of law provision is to assure that the laws of a different state within the United States do not apply rather than to prevent the application of federal law. For example, in the case of *DeCaminada v Coopers & Lybrand, L.L.P.*, 232 Mich. App. 492; 591 N.W. 2d 364 (1998), the Michigan Court of Appeals confirmed that where the FAA applies, it preempts state law. In that case, the Michigan Court of appeals applied the FAA even in the face of a New York choice of law provision. The court stated:

> State courts are bound, under the Supremacy Clause, US Const. art VI, cl 2, to enforce the FAA's substantive provisions. *Kauffman v Chicago Corp.*, 187 Mich App 284, 286; 466 NW 2d 726 (1991).
>
> . . . application of the FAA implicates the Supremacy Clause, which precludes us from applying our state constitution or laws to defeat federal legislation. *Id.* at 501-02, citing US Const. art VI, cl 2.

Petitioner's argument that the standard of review under the FAA should not have been applied is unsupportable and this Court should deny the Petition for Writ of Certiorari.

III. The Arbitration Award Must Be Upheld

This award must be enforced in its entirety because it was rendered after a thorough and lengthy arbitration decision and by a panel of three lawyers specializing in computer software matters. The hearing lasted five days. The arbitrators closely observed the witnesses, their demeanor and the facts and evidence presented at the hearing. Their decision was well reasoned, consistent with the Agreement, the parties' intentions under the Agreement, and Michigan law. CST breached the Agreement by refusing to pay IMS for the sale of the Jacada product to JBA, which sale was procured by IMS. CST also breached the Agreement by violating the exclusive distribution rights granted to IMS in the Agreement. As a result of this breach,

IMS suffered damages as clearly and appropriately reflected in the decision of the arbitrators.

The fundamental role of contract interpretation is to give effect and meaning to the parties' intentions when they entered into the contract.[11] A contract must be read as a whole and meaning must be given to each provision.[12] Courts must adopt interpretations that will result in a reasonable and just contract.[13]

As stated in paragraph 1(a) of the Agreement:

> **So long as IMS has the EXCLUSIVE RIGHT to Direct Market JACADA/400, CST hereby retains no rights to Direct Market JACADA/400 in the Territory during the term of this Agreement (Ex. 1).**

Paragraph 10 of the Agreement contains a limitation of liability provision, purporting to limit the recovery for a breach to amounts IMS paid to CST under the Agreement.[14] In order to give the exclusive right to direct market granted to IMS any meaning or effect, and when reading the contract as a whole, that limitation provision cannot be applied to a breach of the exclusive distribution rights granted by the Agreement. Such an interpretation would give the exclusive distribution right no

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11. *Terry Barr Sales v All-Lock Co.*, 96 F.3d 174 (6th Cir. 1996); *SSC Associates Ltd Partnership v General Retirement Systems*, 210 Mich. App. 449, 534 N.W. 2d 160 (1995).

12. *National Enters v Smith*, 913 F. Supp. 534 (E.D. Mich. 1996) *vacated and remanded on other grounds*, 114 F.3d 561 (6th Cir. 1997).

13. *Wembelton Dev. Co. v Travelers Ins. Co.* 45 Mich. App. 168, 206 N.W. 2d 222 (1973)

14. The administration of the Agreement was such that IMS would market the product, locate a purchaser, buy the product from CST, then re-sell to the purchaser with a mark-up. The purpose of the limitation of damages provision was to assure that, in the event the product was defective and the purchaser rejected, IMS would, in that case, be limited to recover from CST only the amount IMS had paid CST to purchase the product (or license keys).

effect, meaning or purpose and consideration for the Agreement itself would fail.

Because the goal is to harmonize the contract as a whole by giving effect to each contractual clause,[15] the arbitrators appropriately did not apply the limitation of liability provision to the exclusive distribution rights created under the Agreement. Were the arbitrators to have given the Agreement the reading proposed by CST, CST could violate the exclusive distribution rights granted to IMS the day after the execution of the Agreement and IMS would have no recourse, giving that provision no meaning. Or, reading the Agreement as suggested by CST, CST could permit IMS to market the product, evangelize to the computer industry about the product and line up a whole host of sales, only to have CST step between IMS and the purchaser and, again, IMS would have no remedy. This is exactly what happened in the instant situation and the arbitrators appropriately determined that the limitation provision could not be applied to CST's breach of IMS' exclusive distribution rights.

The only witnesses who testified as to the intent and meaning of the limitation of damages provision were Mr. Shearing and Mrs. Roark Peters (both on behalf of IMS). They testified that that provision was not intended by the parties to apply to a circumstance in which CST breached the exclusive right of IMS to distribute the Jacada product. As explained, were the limitation provision given effect in this circumstance, there would have been no consideration given in exchange for IMS' promise to use its best efforts to market and distribute the Jacada/400 product. This distinction is critical, that being the difference between limiting a remedy and prohibiting any remedy at all.[16]

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15. *National Enters v Smith, supra.*

16. Presuming the limitation provision were enforced, the Agreement would be voidable for lack of consideration and Michigan's procuring cause doctrine supports the award.

Mr. Frank Coggrave signed the Agreement on behalf of CST and could have testified as to CST's intent. CST did not call him as a witness. CST's counsel who was involved in the drafting of the contract (Ms. Roark Peters' counterpart) was listed as a witness by CST but never called to testify. Michigan Standard Jury Instruction 6.01 provides that where CST fails to offer someone as a witness, the fact finder may infer that the evidence would have been adverse to CST. CST's failure to offer either Mr. Coggrave or Ms. Wannamaker is indicative of the fact that their testimony would have confirmed the parties' contractual intentions as explained by Ms. Roark Peters. The arbitral panel found as a fact, that IMS was the procuring cause of the sale of the Jacada product to JBA (R. 51, JA 92). CST does not argue in this appeal that it did not breach the Agreement. CST argues that IMS should not be able to recover its damages.

Whether a damages limitation provision fails of its essential purpose is a question of fact to be submitted to the fact finder.[17] In *Filenet*, the parties had a dispute over an agreement whereby Filenet agreed to design and install a computer imaging system for use by Central On Line Data Systems (COLDS). The jury (not the court) was presented with the question whether the limitation of damages provision failed of its essential purpose. The arbitrators' finding that the limitation provision failed of its essential purpose, is a finding of fact and may not be overturned on review under Section 10 of the FAA.[18]

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17. *See Central On Line Data Systems, Inc. v Filenet Corporation*, United States Court of Appeals for the Sixth Circuit, unpublished decision, August 23, 1996, Docket no. 95-1016/54, Lexis No. 25261; *see also Forster v Navistar International Transportation Corp.*, Michigan Court of Appeals decision, Docket No. 233048 and 234995, August 27, 2002, unpublished, pp. 15 and 17, citing 67A Am. Jur. 2d, Sales, §§ 921-925, pp 325-330. All unpublished decisions are attached to Respondent's Brief filed with the Circuit Court.

18. Note that the contract in *Filenet*, *supra*, like the Agreement between IMS and CST included the purchase of a product and the

(Cont'd)

The Sixth Circuit similarly determined that the question whether a damages limitation provision fails of its essential purpose is a question of fact.[19] Similar to the present action, *St. Luke's Hospital* involved the purchase of a computer system. The contract included a limitation of liability provision, similar to that in the present case, attempting to limit the seller's liability to the price the buyer paid for the license. The District Court for the Eastern District of Michigan determined that the "[r]esolution of the limitation provision's viability under these standards is clearly factual. The duration and complexity of the arbitration proceedings bears that out." *Id.* at 1248.

The Sixth Circuit thereafter concluded as follows:

> *While we agree with the district court that the question of the validity of the limitation provision is a question of fact*, we disagree that from the award as written it is an "inescapable conclusion that the arbitrator" made the necessary factual determination.

St. Luke's, supra at 25, emphasis added. The arbitrator's award did not expressly state that the arbitrator found the limitation of damages provision to have failed of its essential purpose. Rather, the final determination by the arbitrator simply disregarded the limitation provision. The Sixth Circuit Court went on to quote the case of *In re Granite Worsted Mills, Inc.*, 25 N.Y.2d 451, 457, 306 N.Y.S. 2d 934, 255 N.E. 2d 168 (1969), stating as follows:

> There is no doubt that an arbitrator, if he so decides, may indeed refuse to enforce such a damage

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(Cont'd)

performance of a service. Filenet's contract required Filenet to study, design, make specifications, deliver, install, modify, test and maintain the equipment. *Id.* at 3.

19. *St. Luke's Hospital v SMS Computer Systems, Inc.*, unpublished decision, Docket Nos. 92-1205/1206, June 1, 1993, Lexis 13549, reported as table case at 995 F.2d 1067 (6th Cir. 1993); *St. Luke's Hospital v SMS Computer Systems, Inc.*, 785 F. Supp 1243, 1246 (U.S. Dist, E.D. Mich. 1991).

> limitation clause on the ground of unconscionability or on other grounds and today's decision does not in any way limit that power. What is required, however, is that the award indicate that he was in fact deliberately and intentionally exercising that power so that judicial review can proceed without the need for speculation as to what has in fact occurred in the arbitral tribunal.

St. Luke's, *supra* at 27. Consistent with the requirements set forth in the District Court and the Sixth Circuit's decisions in *St. Luke's*, *supra*, the arbitrators in the present action made an express factual determination that the limitation of damages provision failed of its essential purpose and therefore could not be enforced. Further, they thoroughly explained their decision in that regard.

A host of other Michigan cases support the arbitrators' application of the failure of the essential purpose doctrine in this action.[20] So long as a reviewing court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators may the award be set aside.[21] There was no

20. In *West Branch Tank & Trailer, Inc. v Searfoss*, unpublished, Doc. No. 194399, March 10, 1998, *see UAW-GM Human Resource Center v KSL Recreation Corporation*, 228 Mich. App. 486, 508; 579 N.W. 2d 411 (1998) (contract for the use of the recreation center for a conference) and *Moore v St. Clair Co.*, 120 Mich. App. 335, 339; 328 N.W. 2d 47 (1982). "A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in case of a breach." *UAW-GM Human Resources*, *supra* at 508, citing *Papo v Aglo Restaurants of San Jose, Inc.*, 149 Mich. App. 285, 294; 386 N.W. 2d 177 (1986). The limiting clause in the subject Agreement attempted to fix any damages against CST to the amount paid by IMS to purchase the product.

21. *Merrill Lynch*, *supra*, at 421; citing *Storer Broadcasting Co. v American Fed'n of Television and Radio Artists*, 600 F.2d 45 (6th Cir. 1979) and *Ainsworth v Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1269 (1993).

misapplication of law or fact. Nevertheless ". . . even a misapplication of well defined and explicit legal principles does not constitute manifest disregard". *Merrill Lynch, supra*, at 421. **CST has pointed to no controlling case law prohibiting application of the failure of the essential purpose doctrine to the present action.** The arbitrators' determination regarding the invalidity of the limitation of liability provision must be upheld.

A federal court reviewing an arbitration award may only set aside the award in the following relevant circumstance:

> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

"Once an arbitration is conducted under a valid arbitration contract, the FAA 'provides the exclusive remedy for challenging acts that taint an arbitration award'."[22] Due to the very strong public policy in favor of enforcing arbitration agreements, courts have "only a limited role in reviewing arbitration awards as authorized under the FAA."[23] The review of an arbitration decision is "one of the narrowest standards of review in all of American Jurisprudence."[24]

As stated by the Sixth Circuit Court of Appeals in *Merrill Lynch v Alberico*, 70 F.3d 418 (6th Cir. 1995):

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22. *Decker v Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 205 F.3d 906, 909 (6th Cir. 2000) (citing *Core v New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982)).

23. *Decker, supra* at 910-11 (citing *Federated Department Stores, Inc.*, 894 F.2d at 866; *Moses H. Cone Mem'l Hospital v Mercury Construction Co.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).

24. *Lattimer-Stevens Co. v United Steelworkers*, 913 F.2d 1166, 1169 (6th Cir. 1990).

> If a court can find *any line of argument that is legally plausible and supports the award* then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside. *Merrill Lynch, supra*, at 421; citing *Storer Broadcasting Co. v American Fed'n of Television and Radio Artists*, 600 F.2d 45 (6th Cir. 1979) and *Ainsworth v Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1269 (1993). (emphasis added).
>
> * * *
>
> *. . . even a misapplication of well defined and explicit legal principles does not constitute manifest disregard. Merrill Lynch, supra*, at 421. (emphasis added).

In order to further:

> "the objective of arbitration, which is to enable parties to resolve disputes promptly and inexpensively, without resort to litigation and often without any requirement that the arbitrators state the rationale behind their decision" . . . [a]n award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law.[25]

As stated by the Sixth Circuit in *Eisenmann Corp. v Sheet Metal Workers Int'l Ass'n Local No. 24*, 323 F.3d 375, 380 (6th Cir. 2003), quoting *Major League Baseball Players Ass'n v Garvey*, 532 U.S. 504, 509 (2001):

> [I]f an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.

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25. *Flender Corporation v Techna-Quip Company*, 953 F.2d 273 (7th Cir. 1992).

Therefore, this Court may vacate the arbitration award only if no judge or group of judges could conceivably have come to the same conclusions as these three attorney arbitrators with special qualifications in computer technology. CST could not meet this standard and the arbitration award was appropriately enforced under the Convention and Chapter 1 of the FAA.

CONCLUSION AND REQUEST FOR RELIEF

While CST's Petition does a commendable job in painting a picture of judicial confusion in need of this Court's guidance, a review of the law CST cites confirms it is only CST that is confused.

The language of the Convention, the FAA, and the case law interpreting and applying those bodies of law, confirm the district court could have come to no other conclusion but that the arbitration award here in question is NOT domestic and therefore, is enforceable under the Convention and Chapter 1 of the FAA. The district court had subject matter jurisdiction under the FAA as well as diversity jurisdiction under 28 U.S.C. § 1332.

The award of the arbitration panel must be upheld because it is supported by the facts and the law. Specifically, the award draws its essence from the Agreement and is consistent with the parties' intentions and past practice. The District Court properly applied the FAA's standard of review.

For all of these reasons, Respondent, IMS, hereby requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM MOTION FOR SUMMARY DISPOSITION OF THE STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED NOVEMBER 28, 2001

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

01-031319-CZ

JACADA (Europe), Ltd., f/k/a CLIENT SERVER TECHNOLOGY (Europe), Ltd., an English company.

Plaintiff,

-vs-

INTERNATIONAL MARKETING STRATEGIES, INC., a Michigan corporation,

Defendant.

MOTION FOR SUMMARY DISPOSITION

PROCEEDINGS had in the above-entitled matter before the HONORABLE DENISE LANGFORD MORRIS (P34884), Circuit Judge, on WEDNESDAY, NOVEMBER 28, 2001.

[12] . . . subject of the dispute? 2) Does the agreement provide for arbitration in the territory of a signatory of the Convention? 3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial? 4) Is a party to the agreement not an American citizen or does the commercial relationship have some reasonable relation with one or more foreign states?

Appendix A

This Court after careful review of the pleadings, exhibits and applicable law finds that Defendant's Motion for Summary Disposition must be denied, because there is no grant of exclusive jurisdiction to the Federal Courts under the Convention and the Convention recognizes that state courts have jurisdiction over actions to vacate awards. However, this Court also finds that the arbitration award is not a domestic award and is subject to the Convention, because all of the answers to the *Ledee* test are affirmative. The arbitral award in this case arises out of a legal relationship, which is commercial in nature and which is not domestic in scope.

Therefore, Defendant is entitled to remove this action to Federal Court pursuant to Section 205.

[13] In conclusion, it is hereby ordered that Defendant International Marketing Strategies' Motion for Summary Disposition pursuant to MCR 2.116(C)(4), (8) and (10) is denied.

I'll sign the appropriate order.

MR. QUICK: Thank you, Your Honor.

* * * *

APPENDIX B — ORDER OF THE STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND DENYING MOTION FOR SUMMARY DISPOSITION DATED DECEMBER 11, 2001

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

JACADA (Europe), Ltd., f/k/a CLIENT SERVER TECHNOLOGY (Europe), Ltd., an English company,

Plaintiff,

and

INTERNATIONAL MARKETING STRATEGIES, INC., a Michigan corporation,

Defendant.

ORDER DENYING MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the City of Pontiac, County of Oakland, State of Michigan this 11th day of December, 2001.

This matter having been brought before the Court on the Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(4), MCR 2.116(C)(8) and MCR 2.116(C)(10) and the Court having read and reviewed the briefs submitted by both parties in support of, and in opposition to, said motion and the Court having heard brief oral argument on November 28, 2001, and being fully advised in the premises;

Appendix B

NOW THEREFORE, IT IS HEREBY ORDERED that the Defendant's motion is denied for the reasons contained in the opinion of the Court as stated on the record on November 28, 2001; and

JUDGE DENISE LANGFORD MORRIS
Hon. D[illegible]e Langford Morris